No. 98-1464-CFX Title: Janet Reno, Attorney General, et al., Petitioners
v.
Charlie Condon, Attorney General of South Carolina, et al.

Docketed:
March 15, 1999 Court: United States Court of Appeals for the Fourth Circuit

Entry	Date	Proceedings and Orders
	Mar 15 1999	Petition for writ of certiorari filed. (Response due April 14, 1999)
	Apr 13 1999	Memorandum of respondents Charlie Condon, Attorney General, et al. filed.
	Apr 27 1999	DISTRIBUTED. May 13, 1999
	Apr 28 1999	Reply brief of petitioners Janet Reno, Attorney General, et al. filed.
	May 17 1999	Petition GRANTED. SET FOR ARGUMENT November 10, 1999. **********
	Jun 21 1999	Order extending time to file brief of petitioner on the merits until July 15, 1999.
	Jun 24 1999	Joint appendix filed.
	Jul 15 1999	Brief of petitioners Janet Reno, Attorney General, et al. filed.
	Jul 15 1999	Brief amicus curiae of Electronic Privacy Information Center filed.
	Jul 15 1999	Brief amici curiae of Feminist Majority Foundation, et al. filed.
	Jul 15 1999	Brief amici curiae of Screen Actors Guild, et al. filed.
	Jul 29 1999	Order extending time to file respondents' brief on the merits to and including September 3, 1999.
	Sep 2 1999	Brief amicus curiae of Home School Legal Defense Association filed.
	Sep 2 1999	Brief amici curiae of Reporters Committee For Freedom of the Press, et al. filed.
	Sep 2 1999	Brief amicus curiae of Pacific Legal Foundation filed.
	Sep 2 1999	Brief of respondents Charlie Condon, Attorney General, et al. filed.
	Sep 3 1999	Brief amici curiae of National Conference of State Legislatures, et al. filed.
	Sep 3 1999	Brief amicus curiae of Washington Legal Foundation filed.
	Sep 3 1999	Brief amici curiae of Alabama, et al. filed.
	Sep 9 1999	Record filed.
	Sep 21 1999	CIRCULATED.
	Oct 4 1999	Reply brief of petitioners Janet Reno, Attorney General of the United States, et al. filed.
	Oct 4 1999	LODGING consisting of twenty copies of the affidavit of James Theil, submitted by the Attorney General and distributed.
	Oct 8 1999	Record filed.
	Oct 20 1999	Supplemental brief of petitioners filed.
	Oct 25 1999	Supplemental brief of respondents filed.
	Nov 10 1999	ARGUED.

FILED

981464 MAR 15 1999

No.

In the Supreme Court of the United States

OCTOBER TERM, 1998

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, ET AL., PETITIONERS

v.

CHARLIE CONDON, ATTORNEY GENERAL FOR THE STATE OF SOUTH CAROLINA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Driver's Privacy Protection Act of 1994, 18 U.S.C. 2721-2725, contravenes constitutional principles of federalism.

PARTIES TO THE PROCEEDING

Petitioners are the Attorney General of the United States and the United States of America.

Respondents are the Attorney General for the State of South Carolina, the State of South Carolina, the South Carolina Press Association, the Virginia Press Association, the West Virginia Press Association, the Maryland/Delaware/District of Columbia Press Association, the Newspaper Association of America, and the American Society of Newspaper Editors.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Attorney General of the United States and the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-37a) is reported at 155 F.3d 453. The opinion of the district court (App., *infra*, 38a-72a) is reported at 972 F. Supp. 977.

JURISDICTION

The judgment of the court of appeals was entered on September 3, 1998. A petition for rehearing was denied

on December 22, 1998. App., *infra*, 73a-74a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Commerce Clause of the United States Constitution, Article I, Section 8, Clause 3, provides: "The Congress shall have Power * * * To regulate Commerce * * * among the several States."

2. The Tenth Amendment to the United States Constitution provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

3. The Driver's Privacy Protection Act of 1994, 18 U.S.C. 2721-2725, is reprinted in an appendix to this petition (App., *infra*, 75a-81a).

STATEMENT

1. This case involves a constitutional challenge brought by the State of South Carolina to the Driver's Privacy Protection Act of 1994 (DPPA), 18 U.S.C. 2721-2725, which restricts disclosure of personal information from state motor vehicle records.[1] An individual who

[1] The DPPA was enacted as part of an omnibus crime control law, the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, Tit. XXX, § 300002, 108 Stat. 2099. The Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee held hearings on the DPPA on February 3 and 4, 1994. Those hearings were never printed, and we are informed by the Clerk of the Judiciary Committee that the Committee no longer has documents or transcripts relating to the DPPA hearings. The principal prepared submissions to the Subcommittee are available on Westlaw. See *Protecting Driver Privacy: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 103d Cong., 2d Sess., *available at* 1994 WL 212813, 212822, 212833, 212834, 212835, 212836, 212696, 212698, 212701, 212712, 212720 (Feb. 3-4, 1994).

seeks a driver's license from his State's department of motor vehicles (DMV) is generally required to give the state agency a range of personal information, including the driver's name, address, telephone number, and in some cases medical information that may bear on the driver's ability to operate a motor vehicle. In some States, the DMV also requires a driver to provide his social security number and takes a photograph of the driver. State DMVs, in turn, routinely sell this personal information to individuals and businesses.[2] Although DMVs generally charge only a small fee for each particular sale of information, aggregate revenues are substantial. For example, New York's motor vehicle department earned $17 million in one year from individuals and businesses that used the State's computers to examine driver's license records. See 1994 WL 212813 (Feb. 3, 1994) (statement of Janlori Goldman, American Civil Liberties Union).

The personal information sold by DMVs is also used extensively to support the marketing efforts of corporations and database compilers. See 1994 WL 212836 (Feb. 3, 1994) (statement of Richard A. Barton, Direct Marketing Association) ("The names and addresses of

[2] Representative Moran, a sponsor of the DPPA, observed: "Currently, in 34 States across the country anyone can walk into a DMV office with your tag number, pay a small fee, and get your name, address, phone number and other personal information—no questions asked." 140 Cong. Rec. H2522 (daily ed. Apr. 20, 1994); see also 139 Cong. Rec. 29,466 (1993) (statement of Sen. Boxer); *id.* at 29,468 (statement of Sen. Warner); *id.* at 29,469 (statement of Sen. Robb); 1994 WL 212834 (Feb. 3, 1994) (statement of Dr. Mary J. Culnan, Georgetown University); 1994 WL 212813 (Feb. 3, 1994) (statement of Janlori Goldman, American Civil Liberties Union).

vehicle owners, in combination with information about the vehicles they own, are absolutely essential to the marketing efforts of the nation's automotive industry."). This information "is combined with information from other sources and used to create lists for selective marketing use by businesses, charities, and political candidates." *Ibid.* See also 1994 WL 212834 (Feb. 3, 1994) (statement of Dr. Mary J. Culnan, Georgetown University) (describing use of DMV information by direct marketers).

The highly publicized 1989 murder of actress Rebecca Schaeffer brought to light the potential threat to privacy and safety posed by this commerce in motor vehicle record information. Schaeffer had taken pains to ensure that her address and phone number were not publicly listed. Despite those precautions, a stalker was able to track her down by obtaining her home address through her state motor vehicle records. See 140 Cong. Rec. H2522 (daily ed. Apr. 20, 1994) (statement of Rep. Moran). Evidence gathered by Congress revealed that that incident was similar to many other crimes in which stalkers, robbers, and assailants had used state motor vehicle records to locate, threaten, and harm victims.[3]

Moreover, Congress received evidence indicating that a national solution was warranted to address the problem of potentially dangerous disclosures of personal information in motor vehicle records. Marshall Rickert, Motor Vehicle Administrator for the State of

[3] See, *e.g.*, 1994 WL 212698 (Feb. 4, 1994) (statement of Rep. Moran); 1994 WL 212822 (Feb. 3, 1994) (statement of David Beatty, National Victim Center); 1994 WL 212833 (Feb. 3, 1994) (statement of Donald L. Cahill, Fraternal Order of Police); 139 Cong. Rec. 29,469 (1993) (statement of Sen. Robb); *id.* at 29,470 (statement of Sen. Harkin).

Maryland, who testified in support of the legislation on behalf of the American Association of Motor Vehicle Administrators, emphasized that technological advances had dramatically increased the accessibility of state motor vehicle records, but that "many state laws have not kept pace with technological advancements, and permit virtually unlimited public access to driver and motor vehicle records." 1994 WL 212696 (Feb. 4, 1994). Accordingly, he urged that "uniform national standards are needed." *Ibid.* In addition, among the incidents brought to Congress's attention were ones in which stalkers had followed their victims across state lines. See 1994 WL 212822 (Feb. 3, 1994) (statement of David Beatty, National Victim Center).

2. Based on evidence about threats to individuals' privacy and safety from misuse of personal information in state motor vehicle records, Congress enacted the DPPA to restrict the disclosure of personal information in such records without the consent of the individual to whom the information pertains. The DPPA does not require any affirmative act by state motor vehicle agencies.[4] Rather, it simply prohibits any state DMV, or officer or employee thereof, from "knowingly dis-

[4] The DPPA does provide that motor vehicle information shall be disclosed to carry out the purposes of the Automobile Information Disclosure Act, 15 U.S.C. 1231 *et seq.*; the Motor Vehicle Information and Cost Savings Act, 15 U.S.C. 1901 *et seq.*; the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. 1381 *et seq.*; the Anti-Car Theft Act of 1992, Pub. L. No. 102-519, 106 Stat. 3384; and the Clean Air Act, 42 U.S.C. 7401 *et seq.* See 18 U.S.C. 2721(b). This provision makes clear that the DPPA does not bar the States from making disclosures of motor vehicle information required by those other federal statutes. The provision adds no new disclosure requirements beyond those otherwise required by federal law.

clos[ing] or otherwise mak[ing] available to any person or entity personal information about any individual obtained by the department in connection with a motor vehicle record." 18 U.S.C. 2721(a).[5] The DPPA defines "personal information" as any information "that identifies an individual, including an individual's photograph, social security number, driver identification number, name, address (but not the 5-digit zip code), telephone number, and medical or disability information," but not "information on vehicular accidents, driving violations, and driver's status." 18 U.S.C. 2725(3).

The DPPA bars only nonconsensual disclosures. Thus, DMVs may release personal information for any use, if they provide individuals with an opportunity to "opt-out" from disclosure when they receive or renew their licenses. See 18 U.S.C. 2721(b)(11). In addition, a DMV may release personal information about an individual to a requester if the department obtains consent to the disclosure from the individual to whom the information pertains. See 18 U.S.C. 2721(d). A DMV also may disclose information about an individual if the requester has that individual's written consent. 18 U.S.C. 2721(b)(13).

The DPPA explicitly disclaims any restriction on the use of motor vehicle information by "any government agency," including a court, and also "any private person or entity acting on behalf of a Federal, State, or local agency in carrying out its functions." 18 U.S.C. 2721(b)(1). It also expressly permits DMVs to disclose personal information for any state-authorized purpose

[5] A "motor vehicle record" is defined as "any record that pertains to a motor vehicle operator's permit, motor vehicle title, motor vehicle registration, or identification card issued by a department of motor vehicles." 18 U.S.C. 2725(1).

relating to the operation of a motor vehicle or public safety. 18 U.S.C. 2721(b)(14).

The DPPA does not preclude States from disclosing personal information for other uses in which Congress found an important public interest. Thus, States may disclose personal information in their motor vehicle records for use in connection with car safety or theft, driver safety, and other motor-vehicle related matters, 18 U.S.C. 2721(b)(2); by a business to verify the accuracy of personal information submitted to that business, and further to prevent fraud or to pursue legal remedies if the information the individual submitted to the business is revealed to have been inaccurate, 18 U.S.C. 2721(b)(3); in connection with court, agency, or self-regulatory body proceedings, 18 U.S.C. 2721(b)(4); for research purposes, if the personal information is not further disclosed or used to contact the individuals, 18 U.S.C. 2721(b)(5); by insurers in connection with claims investigations, anti-fraud activities, rating, or underwriting, 18 U.S.C. 2721(b)(6); to notify owners of towed or impounded vehicles, 18 U.S.C. 2721(b)(7); by licensed private investigative agencies or security services for permitted purposes, 18 U.S.C. 2721(b)(8); by employers to verify information relating to a holder of a commercial driver's license, 18 U.S.C. 2721(b)(9); for use in connection with private tollways, 18 U.S.C. 2721(b)(10); and in certain circumstances for bulk distribution for surveys, marketing, or solicitation, if individuals are provided an opportunity, "in a clear and conspicuous manner," to prohibit such use of information pertaining to them, 18 U.S.C. 2721(b)(12).

The DPPA also regulates the resale and redisclosure of personal information obtained from state DMVs, 18 U.S.C. 2721(c), and prohibits any person from knowingly obtaining or disclosing any record for a use not

permitted by the DPPA, or providing false information to a state agency to circumvent the DPPA's restrictions on disclosure, 18 U.S.C. 2722(a). The States have no obligation themselves to regulate the use of information obtained under the Act or to pursue legal remedies against any requester who obtains or uses information in violation of the Act.

Finally, the DPPA sets forth penalties and civil remedies for knowing violations of the Act. Any "person" (defined to exclude any State or state agency) who knowingly violates the DPPA may be subject to a criminal fine. 18 U.S.C. 2723(a), 2725(2). A state agency that maintains "a policy or practice of substantial noncompliance" with the DPPA may be subject to a civil penalty imposed by the Attorney General of not more than $5000 per day for each day of substantial noncompliance. 18 U.S.C. 2723(b). Any person who knowingly obtains, discloses, or uses information from a state motor vehicle record for a use not permitted by the DPPA may also be subject to liability in a civil action brought by the person to whom the information pertains. 18 U.S.C. 2724.

3. South Carolina law provides that the Motor Vehicle Division of the Department of Public Safety will release information contained in its motor vehicle records to anyone, provided that the requester fills out a form listing his name and address and stating that the information will not be used for telephone solicitation. S.C. Code Ann. §§ 56-3-510 to 56-3-540 (Law. Co-op. Supp. 1998). The Department of Public Safety is authorized to charge a fee for the release of requested information. *Id.* § 56-3-530. Accordingly, South Carolina law appears to permit disclosures for uses broader than those permitted by the DPPA.

South Carolina brought this action in federal district court, alleging that the DPPA exceeds Congress's constitutional powers, and seeking an injunction against enforcement of the DPPA. The district court granted summary judgment for the State and entered a permanent injunction against the Act's enforcement. App., *infra*, 39a-40a.

The district court ruled that this case was controlled by *New York* v. *United States*, 505 U.S. 144 (1992), and *Printz* v. *United States*, 521 U.S. 898 (1997). The district court found the DPPA similar to the federal statutes invalidated in *New York* and *Printz* because, it believed, "[i]n enacting the DPPA, Congress has chosen not to assume responsibility directly for the dissemination and use of these motor vehicle records. Instead, Congress has commanded the States to implement federal policy by requiring them to regulate the dissemination and use of these records." App., *infra*, 53a.[6]

4. a. A divided panel of the court of appeals affirmed. App., *infra*, 1a-37a. The majority did not express doubt that disclosure and use of personal information held by state DMVs could be considered "commerce" within the scope of Congress's regulatory power under the Commerce Clause of the Constitution. U.S. Const. Art. I, § 8, Cl. 3. The court noted, however, that Congress "is constrained in the exercise of that [commerce] power by the Tenth Amendment. Thus, the question * * * is not whether the DPPA regulates commerce, but whether it is consistent with the system of dual sovereignty established by the Constitution." App., *infra*, 8a.

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[6] The district court also rejected Section 5 of the Fourteenth Amendment as a basis for Congress's power to enact the DPPA. App., *infra*, 56a-72a.

The majority acknowledged that "the DPPA is different in several respects from the statutes struck down in *New York* and *Printz*." App., *infra*, 14a. "Unlike the federal statute in *New York*, the DPPA does not commandeer the state legislative process. In particular, the DPPA does not require the States to enact legislation regulating the disclosure of personal information contained in their motor vehicle records." *Ibid.* Further, the court recognized that, unlike the statute invalidated in *Printz*, "the DPPA does not conscript state officers to enforce the regulations established by Congress. Indeed, the DPPA does not require that state officials report or arrest violators of the DPPA." *Ibid.* The court nonetheless concluded that "state officials must * * * administer the DPPA," and stated that *New York* and *Printz* had made "perfectly clear that the Federal Government may not require State officials to administer a federal regulatory program." *Ibid.* It rejected the government's contention that *New York* and *Printz* govern only the situation where the federal law in question "requires a State to regulate the behavior of its citizens." *Id.* at 15a.

Even on the assumption that the government's reading of *New York* and *Printz* was correct, however, and that the DPPA does not require the States to regulate the behavior of its citizens, the court still found the DPPA unconstitutional. The majority rejected the government's contention that the DPPA could be sustained under cases such as *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), which upheld federal regulation of activities of the States affecting commerce. It believed that *Garcia* established a broad *limit* on Congress's power to regulate state activity: "Under *Garcia* and its progeny, Congress may only 'subject state governments to generally

applicable laws.'" App., *infra*, 15a (quoting *New York*, 505 U.S. at 160). Under the court's reading of *Garcia*, that decision did not govern this case because the DPPA by definition can apply only to state agencies:

> [T]he DPPA exclusively regulates the disclosure of information contained in state motor vehicle records. Of course, there is no private counterpart to a state Department of Motor Vehicles. Private parties simply do not issue drivers' licenses or prohibit the use of unregistered motor vehicles. Thus, rather than enacting a law of general applicability that incidentally applies to the States, Congress enacted a law that, for all intents and purposes, applies *only* to the States.

App., *infra*, 17a.

The panel recognized that other federal statutes prevent private parties from disclosing personal information in various circumstances. App., *infra*, 18a. It regarded that point as irrelevant, however, because, even though Congress had regulated similar activity by private citizens in other federal statutes, it had not regulated private citizens' use and disclosure of personal information in the DPPA itself:

> Under *Garcia*, a statute is constitutional only if it *is* generally applicable. A law is not generally applicable simply because it *could be* generally applicable. That Congress could subject private parties to the same type of regulation is irrelevant to the Tenth Amendment. Congress may invade the sovereignty of the States only when it actually enacts a law of general applicability. Nothing short of that will pass constitutional muster.

Ibid.[7]

b. Judge Phillips dissented. He concluded that the Commerce Clause provides a sufficient constitutional basis for Congress's authority to enact the DPPA. App., *infra*, 27a-37a. Judge Phillips stressed that "the end object of the [DPPA] is the direct regulation of state conduct[,] * * * not the indirect regulation of private conduct * * * by forcing the states directly to regulate that conduct." *Id.* at 29a. He concluded this "direct regulation of State activity * * * distinguishes the DPPA, in the most fundamental of ways, from the federal legislation struck down respectively in *New York* and *Printz*." *Id.* at 30a.

Judge Phillips also contested the majority's reading of *Garcia* as limiting congressional power to situations in which Congress subjects state conduct to laws of general applicability. App., *infra*, 31a-32a. Although Judge Phillips noted that the statutes upheld in *Garcia* and similar cases, such as *EEOC* v. *Wyoming*, 460 U.S. 226 (1983), were laws of general applicability, in that they regulated activities of both state and private actors, he explained that those laws were held constitutional "not so much—if at all—because they applied equally to state and private actors as because they directly regulated state activities rather than using the 'States as implements of regulation' of third parties." App., *infra*, 32a (quoting *New York*, 505 U.S. at 161). And, he suggested, the DPPA "does nothing different from, for example, that done by federal regulation of municipal sewage and state-owned solid waste disposal systems," or "federal regulation of state-owned liquor

[7] Like the district court, the majority of the court of appeals rejected the Fourteenth Amendment as a source of Congress's power to sustain the DPPA. App., *infra*, 22a-26a.

monopolies or lottery facilities. Surely it is no basis for invalidating such regulations that no private equivalent could be found in the particular area of regulation." *Id.* at 36a, 37a.

c. The panel denied the government's petition for rehearing, and the full court denied the government's suggestion of rehearing en banc by a vote of seven to six. App., *infra*, 73a-74a.

REASONS FOR GRANTING THE PETITION

Certiorari is warranted in this case to review "the exercise of the grave power of annulling an Act of Congress." *United States* v. *Gainey*, 380 U.S. 63, 65 (1965). The Fourth Circuit has invalidated the Driver's Privacy Protection Act of 1994 (DPPA) on its face, as violative of the constitutional structure of federalism. Moreover, the court of appeals' decision conflicts directly with the decisions of two other courts of appeals that have upheld the DPPA and have expressly rejected the Fourth Circuit's analysis. *Travis* v. *Reno*, 163 F.3d 1000 (7th Cir. 1998); *Oklahoma* v. *United States*, 161 F.3d 1266 (10th Cir. 1998).[8] In addition, the Fourth Circuit's articulation of the limits on congressional power under the Commerce Clause to regulate state activity is erroneous and may have far-reaching implications for other congressional efforts to regulate commercial activity in which States engage. Review by this Court is therefore warranted.

1. In several fields, Congress has identified a problem in the dissemination of, and commerce in, personal information without the consent of the individual to

[8] Rehearing has been denied in both *Travis* and *Oklahoma*. Another constitutional challenge to the DPPA is still pending before the Eleventh Circuit. See *Pryor* v. *Reno*, No. 98-6261 (argued Nov. 30, 1998).

whom the information pertains, and has acted to restrict and regulate such disclosure and commerce. In the context of information held by private enterprises, Congress has enacted statutes that restrict nonconsensual disclosures of personal information held by video stores, cable television companies, credit bureaus, and electronic communications services.[9] Congress has also restricted disclosures of personal information by the federal government.[10] In much the same way, the DPPA regulates the disclosure of personal information by state DMVs.[11]

There can be no serious dispute that personal information held by state agencies and sold to requesters or made available to requesters for further use in interstate commerce is a proper subject of regulation pursuant to Congress's power under the Commerce Clause. Indeed, the court of appeals did not suggest otherwise. The sale of information by state DMVs generates significant revenues for the States and is integral to the operations of the national direct marketing industry. See pp. 3-4, *supra*; *Travis*, 163 F.3d at 1002. Such information is therefore legitimately subject to federal regulation as a "thing[] in interstate commerce," and its

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[9] See Video Privacy Protection Act of 1988, 18 U.S.C. 2710; Cable Communications Policy Act of 1984, 47 U.S.C. 551; Fair Credit Reporting Act, 15 U.S.C. 1681b; Electronic Communications Privacy Act of 1986, 18 U.S.C. 2702.

[10] See Privacy Act of 1974, 5 U.S.C. 552a (1994 & Supp. III 1997); 26 U.S.C. 6103 (1994 & Supp. II 1996) (confidentiality of tax returns); 13 U.S.C. 9 (confidentiality of census data).

[11] Representative Moran, one of the Act's principal sponsors, explained at a hearing that the DPPA's provisions for allowing individuals to provide consent to disclosure in advance were taken from the Video Privacy Protection Act of 1988. See 1994 WL 212698 (Feb. 4, 1994).

dissemination is also legitimately subject to Congress's Commerce Clause power as an activity "having a substantial relation to interstate commerce." See *United States* v. *Lopez*, 514 U.S. 549, 558, 559 (1995); see also *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 538 (1985); *EEOC* v. *Wyoming*, 460 U.S. 226, 235-236 (1983).

The court of appeals nonetheless concluded that, under constitutional principles of federalism, Congress may not employ its power under the Commerce Clause to regulate state activity in or affecting commerce unless that regulation is effected pursuant to a "law of general applicability," *i.e.*, a single statute that applies both to state activity and also to essentially identical activity undertaken by private enterprises. App., *infra*, 18a. The court drew this supposed rule from this Court's decision in *Garcia*, which it read to establish that "Congress may only subject state governments to generally applicable laws." *Id.* at 15a (internal quotation marks omitted). This Court's decisions, however, establish no such principle.

This Court has held that it is *permissible* for Congress to regulate activity in or affecting commerce undertaken by the States in circumstances where Congress has also regulated similar activity undertaken by private enterprises. See, *e.g.*, *Garcia*, *supra*; *EEOC* v. *Wyoming*, *supra*. The reason why such an exercise of congressional power is permissible, however, is not that in such cases Congress has simultaneously addressed activity undertaken by both state and private actors. Nor has it anything to do with the formal structure of the law passed by Congress—namely, that Congress enacted regulation of both private and state activity in the same piece of legislation rather than in separate laws. Rather, the exercise of congressional authority to

regulate state activity in or affecting commerce is permissible because, by its nature, it does not impinge on the residual sovereignty that the States retain under the Constitution. As Judge Phillips explained, the statutes challenged in *Garcia* and *Wyoming* were upheld "because they directly regulated state activities rather than using the 'States as implements of regulation' of third parties." App., *infra*, 32a (quoting *New York* v. *United States*, 505 U.S. 144, 161 (1992)). Those statutes were therefore found to be consistent with the system of dual sovereignty established by the Constitution, which "authorizes Congress to regulate interstate commerce directly," including activities undertaken by state agencies that are in or that affect interstate commerce, even if "it does not authorize Congress to regulate state governments' regulation of interstate commerce." *New York*, 505 U.S. at 166.

The same is true where (as here) Congress regulates state activity in or affecting commerce under a law directed only at that particular activity. Congress might decide that a particular danger affecting interstate commerce arises from the sale or dissemination of information held only in the hands of state agencies; or it might decide that the danger, although roughly analogous to a similar danger posed by misuse of information in private hands, is sufficiently different that it should be addressed in a statute designed for and directed at the matter at hand. The Commerce Clause does not require Congress to impose blanket regulations governing the dissemination and sale of personal information in all sectors, nor does it deny to Congress the flexibility of addressing the concerns raised by such disclosures and sales on a sector-by-sector basis, including giving consideration to whatever factors might weigh in favor of particular exemptions in particular contexts

warranting disclosure. Whatever underlay Congress's decision in the DPPA to address disclosures and sales of personal information by state agencies separately, that decision does not somehow render Congress's otherwise unobjectionable regulation of commerce improper. It remains true that, when Congress directly regulates an activity in or affecting interstate commerce undertaken by a state agency, it regulates commerce, not the State's regulation of commerce. As the Seventh Circuit observed, the DPPA "affects states as owners of databases; it does not affect them in their role as governments." *Travis*, 163 F.3d at 1004.

2. This Court's decisions also establish that Congress may not "command[eer]" the States either by requiring them "to enact or enforce a federal regulatory program" or by "conscripting the States' officers directly" in the enforcement of federal law. *Printz* v. *United States*, 521 U.S. 898, 935 (1997); see *New York*, 505 U.S. at 188. The court of appeals acknowledged that the DPPA requires neither that the States enact legislation nor that state officials arrest or report violators of the DPPA; rather, the DPPA is enforced entirely through civil penalties and criminal fines sought by the federal government, and through civil causes of action brought against individuals. App., *infra*, 14a. Nonetheless, the lower court suggested that state officials must "administer the DPPA," and that the DPPA therefore runs afoul of the Court's holdings in *New York* and *Printz* that "the Federal Government may not require State officials to administer a federal regulatory program." *Ibid.* That reading of *New York* and *Printz* is incorrect, and the lower court's decision on that point is directly contrary to this Court's decision in *South Carolina* v. *Baker*, 485 U.S. 505 (1988).

When the Court in *New York* gave force to the constitutional rule that Congress may not "commandeer" the States, it explained that, under the system of dual sovereignty, "the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." 505 U.S. at 161, 162. The DPPA, however, does not "commandeer" the States' governmental authority in that way. To the contrary, the DPPA "directly regulates the disclosure of [the specified] information," and it makes enforcement "the job of federal officials." *Oklahoma*, 161 F.3d at 1272; accord *Travis*, 163 F.3d at 1005 ("Wisconsin is no more a regulator or law enforcer when it decides what information to release from its database than is the corner Blockbuster Video outlet [when it complies with the Video Privacy Protection Act of 1988]."); App., *infra*, 29a (Phillips, J., dissenting) ("the end object of the Act is the direct regulation of state conduct" rather than "the indirect regulation of private conduct"); cf. *Baker*, 485 U.S. at 514 (the statute "regulates state activities; it does not * * * seek to control or influence the manner in which States regulate private parties").

State officials may, of course, have to take administrative steps to bring their agencies into compliance with the DPPA. The Court has made clear, however, that the necessity of taking such steps to ensure that the States conform to federal law does not amount to "commandeering" of state governments in contravention of the Constitution. As the Court explained in *South Carolina* v. *Baker*: "That a State wishing to engage in certain activity must take administrative and sometimes legislative action to comply with federal standards regulating that activity is a commonplace that presents no constitutional defect." 485 U.S. at 514-

515. Indeed, if taking administrative steps to ensure compliance with federal law amounted to the forbidden "commandeering," then the Court's decision in *Garcia*, upholding the application of the Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.* (FLSA) to state employment, would be a nullity, "for the FLSA requires states to establish record-keeping systems and to establish mechanisms for paying employees according to a national formula. Every federal law that affects the way states participate in the marketplace may do the same." *Travis*, 163 F.3d at 1003-1004.

Moreover, the DPPA in no way interferes with a State's ability to collect information from its citizens or to use that information for motor vehicle-related or other governmental purposes. See 18 U.S.C. 2721(b)(1) and (14). Also, "[n]othing in the [DPPA] interferes with states' ability to license drivers and remove dangerous ones from the road." *Travis*, 163 F.3d at 1003; accord *Oklahoma*, 161 F.3d at 1272 ("The DPPA neither limits a state's ability to regulate in the field of automobile licensing and registration * * * nor restricts a state's ability to use motor vehicle information in its own regulatory activities."). And, far from imposing affirmative obligations on States, the DPPA simply imposes reasonable federal restrictions on the exercise of state authority. The DPPA thus effectively operates to preempt state law insofar as that state law may allow dissemination of personal information by DMVs in a manner inconsistent with federal law. The system of dual sovereignty established by the Constitution does not prohibit Congress from preempting state law in that manner. See *New York*, 505 U.S. at 167-168, 173-174; *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 290 (1981).

3. Congress enacted the DPPA after receiving evidence that disclosure of information from motor vehicle records had on numerous occasions led to serious, and indeed fatal, threats to individuals' safety. In addition, Congress understood that motor vehicle records are perhaps unique because (1) they constitute a single database, compiled by the States as a condition of engaging in an important function—driving—which unquestionably affects commerce and which is, in practical effect, a necessity of modern life, and (2) because they can be connected to license plates, which the States require individuals to display in public whenever they drive. Thus, the unique concern that Congress found here arises from the fact that individuals are effectively forced to advertise the key to their personal information on their license plate when they drive. As Representative Moran, one of the Act's sponsors, explained: "The key difference between DMV records and other public records comes from the license plate, through which every vehicle on the public highways can be linked to a specific individual. Anyone with access to data linking license plates with vehicle ownership has the ability to ascertain the name and address of the person who owns that vehicle. Other public records are not vulnerable to abuse in the same way." 140 Cong. Rec. H2523 (daily ed. Apr. 20, 1994).

Congress therefore had an ample basis on which to conclude that abuse of motor vehicle records to obtain individuals' personal information for nefarious purposes posed a sufficient threat to individuals' personal safety and autonomy, such that the exercise of its power under the Commerce Clause was legitimate. See *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat) 316, 421 (1819) ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which

are plainly adapted to that end, which are not prohibited, but consist with letter and spirit of the constitution, are constitutional."). And as the district court observed, South Carolina has offered no state interest in favor of *unqualified* disclosure of personal information in motor vehicle records to place in the balance against the privacy interest that Congress has identified as warranting protection. App., *infra*, 67a.

In sum, the DPPA is a wholly proper regulation of interstate commerce that does not impinge on any aspect of state sovereignty protected by the Constitution. Because the court of appeals has held that Act of Congress unconstitutional in a decision that conflicts with rulings of other courts of appeals, review by this Court is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 1999

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 97-2554

CHARLIE CONDON, ATTORNEY GENERAL FOR THE STATE OF SOUTH CAROLINA; STATE OF SOUTH CAROLINA, PLAINTIFFS-APPELLEES

AND

SOUTH CAROLINA PRESS ASSOCIATION; VIRGINIA PRESS ASSOCIATION; NORTH CAROLINA PRESS ASSOCIATION; WEST VIRGINIA PRESS ASSOCIATION; MARYLAND/DELAWARE/DISTRICT OF COLUMBIA PRESS ASSOCIATION; NEWSPAPER ASSOCIATION OF AMERICA; AMERICAN SOCIETY OF NEWSPAPER EDITORS, INTERVENORS-PLAINTIFFS

v.

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES; UNITED STATES OF AMERICA, DEFENDANTS-APPELLANTS

BETTER BUSINESS BUREAU, INCORPORATED; STATE OF ALABAMA; STATE OF OKLAHOMA; STATE OF IDAHO, AMICI CURIAE

[Argued: June 2, 1998
Decided: Sept. 3, 1998]

Before: HAMILTON and WILLIAMS, Circuit Judges, and PHILLIPS, Senior Circuit Judge.

OPINION

WILLIAMS, Circuit Judge:

The Attorney General of the State of South Carolina (the State) challenged the constitutionality of the Driver's Privacy Protection Act (DPPA), *see* 18 U.S.C.A. §§ 2721-2725 (West Supp.1998), in the United States District Court for the District of South Carolina on the grounds that it violated the Tenth and Eleventh Amendments to the United States Constitution.[1] The United States defended the DPPA, arguing that it was lawfully enacted pursuant to Congress's powers under both the Commerce Clause and Section 5 of the Fourteenth Amendment. After reviewing the parties' arguments, the district court held that the DPPA violated the Tenth Amendment and permanently enjoined its enforcement in the State of South Carolina. *See Condon v. Reno*, 972 F. Supp. 977, 979 (D.S.C. 1997).

On appeal, the United States first contends that the DPPA was lawfully enacted pursuant to Congress's power under the Commerce Clause. Although Congress may regulate entities engaged in interstate commerce, Congress is constrained in the exercise of that

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[1] In addition to the State's claims, several media organizations (Intervenors), challenged the constitutionality of the DPPA on the grounds that it violated the First Amendment. Because the district court found that the DPPA violated the Tenth Amendment, it had no reason to address the constitutionality of the Act under either the Eleventh Amendment or the First Amendment. *See Condon v. Reno*, 972 F. Supp. 977, 979 n. 3 (D.S.C. 1997). Although neither party raised the Eleventh Amendment issue before this Court, Intervenors moved this Court for leave to file an amicus brief to argue that the DPPA violated the First Amendment. Because that issue was not considered by the district court, Intervenors' motion was denied.

power by the Tenth Amendment. As a result, when exercising its Commerce Clause power, Congress may only "subject state governments to generally applicable laws." *New York v. United States*, 505 U.S. 144, 160, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (1992). The DPPA exclusively regulates the disclosure of personal information contained in state motor vehicle records. Thus, rather than enacting a law of general applicability that incidentally applies to the States, Congress passed a law that, for all intents and purposes, applies *only* to the States. Accordingly, the DPPA is simply not a valid exercise of Congress's Commerce Clause power.

In the alternative, the United States contends that the DPPA was lawfully enacted pursuant to Congress's power under Section 5 of the Fourteenth Amendment. When enacting legislation under Section 5 of the Fourteenth Amendment, however, Congress's power "extends only to *enforc[ing]* the provisions of the Fourteenth Amendment." *City of Boerne v. Flores*, —— U.S. ——, ——, 117 S. Ct. 2157, 2164, 138 L. Ed. 2d 624 (1997) (emphasis added). The United States asserts that individuals possess a Fourteenth Amendment right to privacy in their names, addresses, and phone numbers, and that the DPPA enforces that constitutional right. Neither the Supreme Court nor this Court, however, has ever recognized a constitutional right to privacy with respect to such information. Congress is granted a remedial power under Section 5 of the Fourteenth Amendment, not a substantive power. As a consequence, the DPPA is not a valid exercise of Congress's Enforcement Clause power.

Under our system of dual sovereignty, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the

States respectively, or to the people." U.S. Const. amend. X. Because Congress lacked the authority to enact the DPPA under either the Commerce Clause or Section 5 of the Fourteenth Amendment, we affirm the judgment of the district court.

I.

As recited by the district court, the pertinent facts are as follows:

> Congress enacted the DPPA in 1994 in an effort to remedy what it perceived to be a problem of national concern: *i.e.*, the active commerce in, and consequent easy availability of, personal information contained in State motor vehicle records. Testimony before Congress established that as many as 34 States allowed easy access to personal information contained in motor vehicle records and that criminals had used such information to locate victims and commit crimes. Congress also found that many States sell or other wise permit the use of information contained in motor vehicle records for direct marketing purposes.
>
> The DPPA, which [was] scheduled to become effective on September 13, 1997, generally prohibits "a State department of motor vehicles, and any officer, employee, or contractor, thereof, [from] knowingly disclos[ing] or otherwise mak[ing] available to any person or entity personal information about any individual obtained by the department in connection with a motor vehicle record." 18 U.S.C. § 2721(a). The DPPA specifies a list of exceptions when personal information contained in a State motor vehicle record may be obtained and used. *See* 18 U.S.C. § 2721(b).

> Additionally, the DPPA permits State motor vehicle departments to:
>
> > [E]stablish and carry out procedures under which the department or its agents, upon receiving a request for personal information that does not fall within one of the exceptions in [§ 2721(b)], may mail a copy of the request to the individual about whom the information was requested, informing such individual of the request, together with a statement to the effect that the information will not be released unless the individual waives such individual's right to privacy under [§ 2721].
>
> 18 U.S.C. § 2721(d). The DPPA also prohibits "any person [from] knowingly . . . obtain[ing] or disclos[ing] personal information, from a motor vehicle record, for any use not permitted under section 2721(b)," 18 U.S.C. § 2722(a), and from "mak[ing] false representation to obtain any personal information from an individual's motor vehicle record." 18 U.S.C. § 2722(b).
>
> The DPPA provides that "[a]ny State department of motor vehicles that has a policy or practice of substantial noncompliance . . . shall be subject to a civil penalty imposed by the Attorney General of not more than $5,000 a day for each day of substantial noncompliance." 18 U.S.C. § 2723(b). The DPPA also creates a criminal fine, 18 U.S.C. § 2723(a), and a civil cause of action against a "person" who knowingly violates it. 18 U.S.C. § 2724(a).
>
> South Carolina currently has its own statutory provisions regarding the disclosure and use of its

motor vehicle records, and South Carolina's scheme differs significantly from the DPPA. *See* S.C. Code Ann. §§ 56-3-510 -540. Under South Carolina law a person who requests information contained in South Carolina's motor vehicle records must submit the request on a form provided by the State Department of Public Safety ("the Department") and must specify, *inter alia*, his or her name and the reason for the request, and must certify that the information will not be used for the purpose of telephone marketing or solicitation. S.C. Code Ann. § 56-3-510. The Department must retain all requests for motor vehicle record information for five years and must release a copy of all requests relating to a person upon that person's written request. S.C. Code Ann. § 56-3-520. The Department is authorized to charge a fee for releasing motor vehicle record information, and is required to promulgate certain procedural regulations relating to the release of motor vehicle record information, S.C. Code Ann. § 56-3-530, and to implement procedures to ensure that persons may "opt-out" and prohibit the use of motor vehicle record information about them for various commercial activities. S.C. Code Ann. § 56-3-540. The undisputed evidence submitted establishes that implementation of the DPPA would impose substantial costs and effort on the part of the Department in order for it to achieve compliance.

Condon v. Reno, 972 F. Supp. 977, 979-81 (D.S.C. 1997) (footnotes omitted) (all but first alteration in original).

In addition to challenging the constitutionality of the DPPA, the State sought a permanent injunction prohibiting enforcement of the DPPA. The United States

filed a motion to dismiss the suit based upon its contention that the DPPA was lawfully enacted pursuant to Congress's powers under both the Commerce Clause and Section 5 of the Fourteenth Amendment. In response, the State moved for summary judgment in its favor. After reviewing the parties' motions, the district court concluded that the DPPA was unconstitutional. Accordingly, the district court denied the United States' motion to dismiss, granted the State's motion for summary judgment, and permanently enjoined the enforcement of the DPPA in the State of South Carolina. This appeal followed.

II.

In this case, we must determine whether the DPPA violates the Tenth Amendment. Like all Acts of Congress, the DPPA is "presumed to be a constitutional exercise of legislative power until the contrary is clearly established." *Close v. Glenwood Cemetery*, 107 U.S. 466, 475, 2 S. Ct. 267, 27 L. Ed. 408 (1883); *see also I.N.S. v. Chadha*, 462 U.S. 919, 944, 103 S. Ct. 2764, 77 L. Ed. 2d 317 (1983) ("We begin, of course, with the presumption that the challenged statute is valid."). Whether the contrary has been clearly established in this case, as the district court found, is a legal question subject to de novo review. *See Plyler v. Moore*, 129 F.3d 728, 734 (4th Cir. 1997).

The Constitution provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. When, however, Congress "is acting within the powers granted it under the Constitution, [it] may impose its will on the States." *Gregory v. Ashcroft*, 501 U.S. 452, 460, 111 S. Ct. 2395, 115 L. Ed. 2d 410 (1991).

On appeal, the United States contends that the DPPA was lawfully enacted pursuant to Congress's powers under both the Commerce Clause and Section 5 of the Fourteenth Amendment. We address these arguments in turn.

A.

The United States first contends that the DPPA is constitutional because Congress enacted it pursuant to its power under the Commerce Clause. Congress, however, is constrained in the exercise of that power by the Tenth Amendment. Thus, the question before this Court is not whether the DPPA regulates commerce, but whether it is consistent with the system of dual sovereignty established by the Constitution.

1.

When Congress exercises its Commerce Clause power against the States, the resulting enactment is analyzed by the Supreme Court under one of two different lines of cases. *See New York v. United States*, 505 U.S. 144, 160-61, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (1992) (recognizing the two distinct lines of cases); *see also West v. Anne Arundel County, Md.*, 137 F.3d 752, 759-60 (4th Cir. 1998) (same). The first line of cases concerns the authority of Congress to regulate the States as States. *See, e.g., Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 105 S. Ct. 1005, 83 L. Ed. 2d 1016 (1985). Under this line of cases, Congress may enact laws of general applicability that incidentally apply to state governments. The second line of cases concerns the authority of Congress to direct the States to implement or administer a federal regulatory scheme. *See, e.g., Printz v. United States*, —— U.S. ——, 117 S. Ct. 2365, 138 L. Ed. 2d 914

(1997). Under this line of cases, Congress may not enact any law that would direct the functioning of the States' executives or legislatures. Not surprisingly, the United States contends that the instant case falls under the first line, while the State argues (and the district court found) that the case is controlled by the latter line of cases.

a.

The Supreme Court's jurisprudence with respect to the first line of cases has not been a model of consistency. In *Maryland v. Wirtz*, 392 U.S. 183, 88 S. Ct. 2017, 20 L. Ed. 2d 1020 (1968), the Supreme Court first held that Congress could subject state governments to generally applicable laws, such as the Fair Labor Standards Act. In *National League of Cities v. Usery*, 426 U.S. 833, 96 S. Ct. 2465, 49 L. Ed. 2d 245 (1976), the Supreme Court overruled *Wirtz*. In particular, the Court held that the Commerce Clause did not give Congress the authority to regulate the "States as States." *Id.* at 845, 96 S. Ct. 2465 (holding that state employees are not subject to the Fair Labor Standards Act). In other words, Congress could "not exercise [Commerce Clause] power so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made." *Id.* at 855, 96 S. Ct. 2465.[2]

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[2] Without question, "the licensing of drivers constitutes an integral portion of those governmental services which the States and their political subdivisions have traditionally afforded their citizens." *United States v. Best*, 573 F.2d 1095, 1103 (9th Cir. 1978) (internal quotation marks omitted); *see also Peel v. Florida Dep't of Transp.*, 600 F.2d 1070, 1083 (5th Cir. 1979) ("Overseeing the transportation system of the state has traditionally been one of the functions of state government, and thus appears to be within the

The Supreme Court subsequently overruled *National League of Cities* in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 105 S. Ct. 1005, 83 L. Ed. 2d 1016 (1985). In *Garcia*, the Supreme Court decided to leave to the political process the protection of the States against intrusive exercises of Congress's Commerce Clause powers.[3] *Id.* at 547-56, 105 S. Ct. 1005. Thus, under *Garcia* and its progeny, Congress may once again subject the States to legislation that is also applicable to private parties. *See id.* (upholding application of the FLSA to state and local governments because it was a generally applicable law); *EEOC v. Wyoming*, 460 U.S. 226, 103 S. Ct. 1054, 75 L. Ed. 2d 18 (1983) (upholding application of the ADEA to state and local governments because it was a generally applicable law); *South Carolina v. Baker*, 485 U.S. 505, 108 S. Ct. 1355, 99 L. Ed. 2d 592 (1988) (upholding application of the Tax Equity and Fiscal Responsibility Act of 1982 to state and local govern-

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activities protected by the tenth amendment."). Thus, under the *National League of Cities* regime, the DPPA clearly would be unconstitutional.

[3] In his dissenting opinion, then Justice Rehnquist expressed his desire to eventually return to the rule outlined in *National League of Cities*. *See Garcia*, 469 U.S. at 580, 105 S. Ct. 1005 (stating that the principle outlined in *National League of Cities* "will, I am confident, in time again command the support of a majority of this Court"). Until that time, however, we remain bound by the Supreme Court's decision in *Garcia*. *See, e.g., Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989) (stating that "the Court of Appeals should . . . leav[e] to this Court the prerogative of overruling its own decisions"); *West v. Anne Arundel County, Md.*, 137 F.3d 752, 760 (4th Cir. 1998) (noting that "[l]ower federal courts have repeatedly been warned about the impropriety of preemptively overturning Supreme Court precedent").

ments because it was a generally applicable law); *see also Printz*, —— U.S. at ——, 117 S. Ct. at 2383 (noting that under *Garcia* "the incidental application to the States of a federal law of general applicability" was lawful); *New York*, 505 U.S. at 160, 112 S. Ct. 2408 (noting that under *Garcia* and its progeny, Congress may only "subject state governments to generally applicable laws").[4]

b.

In contrast, the Supreme Court's jurisprudence with respect to the second line of cases has been a model of consistency. In *New York v. United States*, 505 U.S. 144, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (1992), the Supreme Court reviewed a federal statute that, among other things, required the individual States either to enact legislation regulating low-level radioactive waste generated within their borders or to take title to the waste. As an initial matter, the Supreme Court noted that this was not a simple case of Congress attempting to regulate the States, which would fall under the *Garcia* line of cases. *See id.* at 160, 112 S. Ct. 2408. Rather, the Supreme Court framed the issue as con-

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[4] Of course, Congress may only subject the States to such legislation if it expresses with unmistakable clarity an intent to do so. *See Pennsylvania Dep't of Corrections v. Yeskey*, —— U.S. ——, ——, 118 S. Ct. 1952, 1954, 141 L. Ed. 2d 215 (1998) (finding that Congress plainly stated its intention to apply the ADA to State prisons and prisoners); *Gregory v. Ashcroft*, 501 U.S. 452, 460, 111 S. Ct. 2395, 115 L. Ed. 2d 410 (1991) (finding that the ADEA did not apply to a state constitutional provision requiring judges to retire at age seventy; the Court will not interpret a federal statute in a manner that would interfere with essential state or local functions unless Congress plainly states its intention to do so in the statute itself). It is undisputed that Congress plainly stated its intention to subject the States to the DPPA.

cerning "the circumstances under which Congress may use the States as implements of regulation; that is, whether Congress may direct or otherwise motivate the States to regulate in a particular field or a particular way." *Id.* at 161, 112 S. Ct. 2408. In answering that question in the negative, the Supreme Court held that Congress could not "commandeer[] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *Id.* at 176, 112 S. Ct. 2408 (internal quotation marks omitted).

In *Printz v. United States*, [521] U.S. [98], 117 S. Ct. 2365, 138 L. Ed. 2d 914 (1997), the Court reviewed an act of Congress, popularly referred to as the "Brady Bill," which regulated the sale of handguns. The Brady Bill, among other things, required state law enforcement officers "to participate, albeit only temporarily, in the administration of [the] federally enacted regulatory scheme." *Id.* at ——, 117 S. Ct. at 2369. As in *New York*, the Supreme Court found that the *Garcia* line of cases was inapplicable to the question before the Court. *See id.* at ——, 117 S. Ct. at 2383 (application of the *Garcia* line of cases is inappropriate "where, as here, it is the whole object of the law to direct the functioning of the state executive"). Instead, the Supreme Court framed the issue as the constitutionality of "the forced participation of the States' executive[s] in the actual administration of a federal program." *Id.* at ——, 117 S. Ct. at 2376. Noting that in *New York* it had held "that Congress cannot compel the States to enact or enforce a federal regulatory program," the Supreme Court in *Printz* held "that Congress cannot circumvent that prohibition by conscripting the State's officers directly." *Id.* at ——, 117 S. Ct. at 2384. The Court went on to note that

> [t]he Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.

Id.

2.

On appeal, the United States relies primarily upon *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 105 S. Ct. 1005, 83 L. Ed. 2d 1016 (1985), and its progeny, while the State relies principally upon *New York v. United States*, 505 U.S. 144, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (1992), and *Printz v. United States*, —— U.S. ——, 117 S. Ct. 2365, 138 L. Ed. 2d 914 (1997). The district court rejected the United States' argument and analyzed the constitutionality of the DPPA under the *New York /Printz* line of cases. *See Condon v. Reno*, 972 F.Supp. 977, 985 (D.S.C. 1997); *see also Travis v. Reno*, 12 F. Supp.2d 921 (W.D. Wis. 1998) (finding the DPPA unconstitutional under *New York /Printz* line of cases); *Oklahoma v. United States*, 994 F. Supp. 1358, 1363 (W.D. Okla. 1997) (finding the DPPA unconstitutional under *New York/Printz* line of cases). *But see Pryor v. Reno*, 998 F. Supp. 1317, 1326-31 (M.D. Ala. 1998) (finding that the DPPA does not compel the

states to regulate and, therefore, is constitutional under *New York* and *Printz*).

We recognize, as the United States argues, that the DPPA is different in several respects from the statutes struck down in *New York* and *Printz*. Unlike the federal statute in *New York*, the DPPA does not commandeer the state legislative process. In particular, the DPPA does not require the States to enact legislation regulating the disclosure of personal information contained in their motor vehicle records. Instead, Congress enacted the regulations limiting the dissemination of information from those records. Moreover, unlike the federal statute in *Printz*, the DPPA does not conscript state officers to enforce the regulations established by Congress. Indeed, the DPPA does not require that state officials report or arrest violators of the DPPA. Instead, the DPPA is enforced through civil penalties imposed by the United States Attorney General against the States and permits criminal fines and civil causes of action against individuals.

Nevertheless, state officials must, as the district court found, administer the DPPA. *See Condon*, 972 F. Supp. at 985-86. The Supreme Court, in both *New York* and *Printz*, has made it perfectly clear that the Federal Government may not require State officials to administer a federal regulatory program. *See Printz*, —— U.S. at ——, 117 S. Ct. at 2384 (holding that "[t]he Federal Government may [not] issue directives requiring the States to . . . administer or enforce a federal regulatory program"); *New York*, 505 U.S. at 176, 112 S. Ct. 2408 (holding that the Federal Government cannot compel the States to administer "a federal regulatory program"). Indeed, allowing the Federal Government to do so would be plainly incompatible with our system

of "dual sovereignty." *Gregory v. Ashcroft*, 501 U.S. 452, 457, 111 S. Ct. 2395, 115 L. Ed. 2d 410 (1991); *see also Tafflin v. Levitt*, 493 U.S. 455, 458, 110 S. Ct. 792, 107 L. Ed. 2d 887 (1990).

The United States attempts to sidestep this problem, however, by contending that the holdings in *Printz* and *New York* apply only when the law in question requires a State to regulate the behavior of its citizens. Rather than requiring a State to regulate its citizens, the United States contends that the DPPA requires a State to regulate its own behavior. Because the DPPA simply regulates a state activity, *i.e.*, the disclosure of personal information contained in state motor vehicle records, the United States contends that the instant case is controlled by the *National League of Cities/ Garcia* line of cases.

Even assuming that the United States' narrow reading of *Printz* and *New York* is correct, analyzing the constitutionality of the DPPA under the *Garcia* line of cases will not salvage the statute. Under *Garcia* and its progeny, Congress may only "subject state governments to generally applicable laws." *New York*, 505 U.S. at 160, 112 S. Ct. 2408 (explaining the difference between the two lines of cases); *see also Printz*, —— U.S. at ——, 117 S. Ct. at 2383 (noting that under *Garcia* "the incidental application to the States of a federal law of general applicability" was lawful). In other words, Congress may only subject the States to legislation that is also applicable to private parties. *See New York*, 505 U.S. at 160, 112 S. Ct. 2408 (noting that under *Garcia*, Congress may only "subject[] a State to the same legislation applicable to private parties").

In *Garcia*, the Supreme Court upheld application of the Fair Labor Standards Act (FLSA) to state and local

governments because the FLSA was generally applicable. Thus, Congress was *only* allowed to regulate how much the States pay their hourly employees because Congress also regulates how much private parties pay their hourly employees. *See Garcia*, 469 U.S. at 528, 105 S. Ct. 1005 (noting that the FLSA is generally applicable); *see also EEOC v. Wyoming*, 460 U.S. 226, 103 S. Ct. 1054, 75 L. Ed. 2d 18 (1983) (same with the ADEA); *South Carolina v. Baker*, 485 U.S. 505, 108 S. Ct. 1355, 99 L. Ed. 2d 592 (1988) (same with the Tax Equity and Fiscal Responsibility Act of 1982).[5] Here,

[5] The dissent argues that the statutes at issue in *Garcia* and *Wyoming* were upheld because they did not use the States as implements of regulation, and not because they were generally applicable. *See post* at [31a-32a]. We disagree. In *New York v. United States*, 505 U.S. 144, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (1992), the Supreme Court cited both decisions as examples of cases dealing with "the authority of Congress to subject state governments to generally applicable laws." *Id.* at 160, 112 S. Ct. 2408. Indeed, the Court specifically stated that under the *Garcia* line of cases, Congress may only "subject[] a State to the same legislation applicable to private parties." *Id.* This understanding of *Garcia* and its progeny was recently reaffirmed in *Printz v. United States*, [521] U.S. [98], ——, 117 S. Ct. 2365, 2383, 138 L. Ed. 2d 914 (1997) (noting that the statutes at issue in *Garcia* and *Wyoming* were upheld because they were generally applicable). The dissent's complaint, therefore, is not with our characterization of the *Garcia* line of cases, but with the Supreme Court's. Cf. *New York*, 505 U.S. at 201, 112 S. Ct. 2408 (White, J., dissenting) (arguing that the statutes in *Garcia* and *Wyoming* were not upheld because they were generally applicable). Although the dissent may question the Supreme Court's analysis in *New York* and *Printz*, it is bound to follow it.

Finally, while conceding that the statutes at issue in *Garcia* and *Wyoming* were generally applicable, the dissent contends that the statute "at issue in *Baker* was not one of general applicability." *Post* at [31a] n.3. Again, we disagree. The tax statute in *South Carolina v. Baker* applied to any entity, whether it be a State or a private party, that issued bonds. *See* 485 U.S. at 510, 108 S. Ct. 1355 (noting that the statute "covers not only state bonds but also bonds issued by the United States and private corporations"). Thus, the law was one of general applicability. Indeed, the Supreme Court in both *New York* and *Printz* expressly distinguished the federal tax statute at issue in *Baker* from the statutes at issue in those cases on the ground that the statute in *Baker* was one of general applicability. *See Printz*, —— U.S. at ——, 117 S. Ct. at 2383; *New York*, 505 U.S. at 160, 112 S. Ct. 2408.

the DPPA does not attempt to regulate the disclosure of personal information contained in all public and private databases, which would incidentally apply to state motor vehicle records. Rather, the DPPA exclusively regulates the disclosure of information contained in state motor vehicle records. Of course, there is no private counterpart to a state Department of Motor Vehicles. Private parties simply do not issue drivers' licenses or prohibit the use of unregistered motor vehicles. Thus, rather than enacting a law of general applicability that incidentally applies to the States, Congress enacted a law that, for all intents and purposes, applies *only* to the States. *See Travis*, [12 F. Supp.2d at 929] ("To state the obvious, the [DPPA] is not a law of general applicability."); *Oklahoma v. United States*, 994 F. Supp. at 1362 (noting that a "cursory review of the [DPPA] indicates that it is directed at States"); *Condon*, 972 F. Supp. at 985-86 ("[I]nstead of bringing the States within the scope of an otherwise generally applicable law, Congress passed the DPPA specifically to regulate the States' control of their property.").

Although recognizing that the DPPA does not regulate private parties, the Government nevertheless argues that the DPPA is constitutional under the

Garcia line of cases. For instance, the United States contends that the DPPA is constitutional because it "subject[s] the States to the same type of regulation to which a private party *could* be subjected." Appellant's Br. at 20 (emphasis added). Not surprisingly, the United States failed to provide even a single authority to support this proposition. Under *Garcia*, a statute is constitutional only if it *is* generally applicable. A law is not generally applicable simply because it *could be* generally applicable. That Congress could subject private parties to the same type of regulation is irrelevant to the Tenth Amendment. Congress may invade the sovereignty of the States only when it actually enacts a law of general applicability. Nothing short of that will pass constitutional muster.

The United States also contends that the DPPA is constitutional under *Garcia* because Congress has already restricted private parties from disclosing personal information in several statutes. In particular, the United States cites the Video Privacy Protection Act, *see* 18 U.S.C.A. § 2710 (West Supp. 1998) (restricting disclosure of personal information contained in video rental records); the Cable Communications Policy Act, *see* 47 U.S.C.A. § 551 (West 1991 & Supp. 1998) (restricting disclosure of personal information about cable subscribers); and the Fair Credit Reporting Act, *see* 15 U.S.C.A. § 1618b (West 1998 & Supp. 1998) (restricting disclosure of credit reports). Although Congress has regulated the disclosure of personal information by some private parties, the Constitution permits Congress to regulate the conduct of *individuals*. In contrast, Congress may not, as a general matter, regulate the conduct of *the States*. *See New York*, 505 U.S. at 166, 112 S. Ct. 2408 ("[T]he Framers explicitly chose a

Constitution that confers upon Congress the power to regulate individuals, not States." (*quoted with approval in Printz*, —— U.S. at ——, 117 S. Ct. at 2377)). The one exception, of course, is that Congress may regulate the conduct of the States through laws of general applicability. Thus, that Congress has "regulate[d] the disclosure of information gathered by a variety of *private* entities," Appellant's Br. at 12 (emphasis added), does not mean that Congress may regulate the disclosure of information gathered by the States absent a generally applicable law.

During oral argument, the United States suggested, for the first time, that the DPPA is generally applicable when considered together with the aforementioned statutes regulating private parties. According to the United States, Congress may enact a statute regulating the States if it has already enacted a statute regulating the same conduct by private parties. Even if the general applicability of the DPPA could be determined in this manner, which we doubt, Congress has simply not enacted a statute regulating the same conduct by private parties. To be sure, Congress has regulated the disclosure of personal information gathered by video stores, cable providers, and credit bureaus. The regulation of these three entities, however, does not provide Congress with a basis for regulating the States. Indeed, we seriously doubt that the Supreme Court would have applied either the FLSA or the ADEA to the States had Congress applied those Acts only to video stores, cable providers, and credit bureaus. It bears repeating that Congress may regulate the conduct of the States *only* through laws of general applicability. At best, Congress has enacted several laws of limited applicability. Thus, even if the general appli-

cability of a statute could be determined in the manner urged upon us by the United States, Congress has not yet enacted a statute regulating the disclosure of personal information by all private parties.

Because the DPPA is not generally applicable, like the FLSA or ADEA, Congress did not have authority under our system of dual sovereignty to enact it.[6]

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[6] The dissent contends that the DPPA is constitutional because Congress could have "preempted the field of motor vehicle information disclosure." *Post* at [29a, 34a-35a]. We disagree. Only "where Congress has the authority to regulate *private* activity under the Commerce Clause . . . [may it] offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation." *New York v. United States*, 505 U.S. 144, 167, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (1992) (emphasis added) (citing *Hodel v. Virginia Surfacing Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 288, 101 S. Ct. 2352, 69 L.Ed.2d 1 (1981)). Unlike the statutes at issue in the cases cited by the dissent, *see Hodel*, 452 U.S. at 288, 101 S. Ct. 2352 (preemption of state laws regulating surface mining); *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 112 S. Ct. 2374, 120 L.Ed.2d 73 (1992) (preemption of state laws regulating occupational safety); *Department of Energy v. Ohio*, 503 U.S. 607, 112 S. Ct. 1627, 118 L. Ed. 2d 255 (1992) (preemption of state laws regulating water pollution); *FERC v. Mississippi* 456 U.S. 742, 102 S. Ct. 2126, 72 L. Ed. 2d 532 (preemption of state laws regulating electric and gas utilities), the DPPA, by its own terms, does not regulate private activity. Moreover, even assuming that Congress could have preempted the field of personal information disclosure, it did not do so here. Rather, Congress chose to regulate the States directly.

Similarly, the dissent contends that the DPPA is constitutional because "in exercise of its Commerce Clause powers, Congress could have, had it desired, made receipt of federal highway funds contingent on accepting [the] DPPA's provisions." *Post* at [29a]. As an initial matter, we note that Congress may attach conditions on the receipt of federal funds pursuant to its power under the Spending Clause, not the Commerce Clause. *See South Dakota v. Dole*, 483 U.S. 203, 107 S. Ct. 2793, 97 L. Ed. 2d 171 (1987) (holding that Congress has power under the Spending Clause to condition highway funds on States' adoption of minimum drinking age). With that having been said, we question whether Congress could have conditioned the States' receipt of federal highway funds on compliance with the DPPA. It is well established that the statute must bear at least some relationship to the purpose of the federal spending. *See id.* at 207-08 & n. 3, 107 S. Ct. 2793. We are hard pressed to see a connection between a privacy statute and highway funds. In any event, even if Congress could have conditioned the States' receipt of federal highway funds on compliance with the DPPA, it did not do so here. As such, that Congress *could* have done so is of absolutely no import. Indeed, the Supreme Court in *New York* and *Printz* held that the statutes at issue in those cases were unconstitutional even though it specifically recognized that both statutes could have been lawfully passed pursuant to Congress's Spending Clause power. *See Printz*, —— U.S. at ——, 117 S. Ct. at 2385 (O'Connor, J., concurring) (noting that Congress could have conditioned the States' receipt of federal funds on compliance with the statute); *New York*, 505 U.S. at 167, 112 S. Ct. 2408 (noting that Congress could have enacted the statute under its Spending Clause power).

Finally, the dissent argues that the DPPA is no different than the "National Voter Registration Act," which was upheld against a Tenth Amendment challenge in *Association of Community Organizations for Reform Now (ACORN) v. Edgar*, 56 F.3d 791 (7th Cir. 1995). *See post* at [37a]. Again, we disagree. The statute at issue in *ACORN*, popularly known as the "motor voter" law, was designed to make it easier to register to vote in federal elections. The Constitution, however, specifically grants Congress the power to regulate the time, place, and manner of congressional elections. *See* U.S. Const. art. I, § 4, cl. 1. Because the "manner" of holding elections includes the system for registering voters, *see Smiley v. Holm*, 285 U.S. 355, 366, 52 S. Ct. 397, 76 L. Ed. 795 (1932), the Seventh Circuit upheld the statute against a Tenth Amendment challenge, *see ACORN*, 56 F.3d at 793-94. We cannot find, and the dissent does not cite, a similar provision in the Constitution that specifically grants Congress the power to regulate the dissemination of personal information. As such, Congress's adoption of the

B.

The United States also contends that the DPPA was properly enacted pursuant to Congress's power under Section 5 of the Fourteenth Amendment. In light of the Supreme Court's landmark decision in *City of Boerne v. Flores*, —— U.S. ——, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997), we are constrained to disagree.[7]

The Fourteenth Amendment provides, in pertinent part, as follows:

> Section 1. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any persons within its jurisdiction the equal protection of the laws.
>
> . . . .
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

U.S. Const. amend. XIV, §§ 1, 5. Section 5 "is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." *Katzen-*

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motor voter law tells us nothing about the constitutionality of the DPPA.

[7] Although the Supreme Court's ground breaking decision in *City of Boerne v. Flores*, —— U.S. ——, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997), was decided in June of 1997, the United States did not cite the case in its opening brief, which was filed in January of 1998.

bach v. Morgan, 384 U.S. 641, 651, 86 S. Ct. 1717, 16 L. Ed. 2d 828 (1966). In fact, "when *properly* exercising its power under § 5, Congress is not limited by the same Tenth Amendment constraints that circumscribe the exercise of its Commerce Clause powers." *EEOC v. Wyoming*, 460 U.S. at 243 n. 18, 103 S. Ct. 1054 (emphasis added) (citing *City of Rome v. United States*, 446 U.S. 156, 179, 100 S. Ct. 1548, 64 L. Ed. 2d 119 (1980)). Congress's power to enact legislation under the Fourteenth Amendment is not unlimited, however. *See, e.g., City of Boerne v. Flores*, —— U.S. ——, ——, 117 S. Ct. 2157, 2171, 138 L. Ed. 2d 624 (1997) (holding that the Religious Freedom Restoration Act is "a considerable congressional intrusion into the States' traditional prerogatives," and that Congress exceeded its power under the Fourteenth Amendment in enacting the statute); *Gregory v. Ashcroft*, 501 U.S. 452, 469, 111 S. Ct. 2395, 115 L. Ed. 2d 410 (1991) (stating that "the Fourteenth Amendment does not override all principles of federalism"); *Oregon v. Mitchell*, 400 U.S. 112, 128, 91 S. Ct. 260, 27 L. Ed. 2d 272 (1970) (noting that "[a]s broad as the congressional enforcement power is, it is not unlimited"). For instance, Congress's power "extends only to *enforc[ing]* the provisions of the Fourteenth Amendment." *City of Boerne*, —— U.S. at ——, 117 S. Ct. at 2164 (emphasis added) (internal quotation marks omitted). Of perhaps equal importance, it is only a preventative or remedial power, not a substantive power. *See id.* at ——, 117 S. Ct. at 2167. As a result, Congress does not possess "the power to determine what constitutes a constitutional violation." *Id.* at ——, 117 S. Ct. at 2164.

Whether Congress properly exercised its power under Section 5 when it enacted the DPPA turns,

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therefore, on whether the Act enforces some right guaranteed by the Fourteenth Amendment. The United States contends "that automobile owners and operators have a reasonable expectation [of privacy in] their names, addresses, and phone numbers," Appellant's Br. at 24, and that the DPPA enforces that constitutional right.

As an initial matter, we note that "there is no general constitutional right to privacy." *Whalen v. Roe*, 429 U.S. 589, 608, 97 S. Ct. 869, 51 L. Ed. 2d 64 (1977) (Stewart, J., concurring) (internal quotation marks omitted). Rather, the Supreme Court has limited the "right to privacy" to matters of reproduction, *see Skinner v. Oklahoma*, 316 U.S. 535, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942), contraception, *see Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965), abortion, *see Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), and marriage, *see Zablocki v. Redhail*, 434 U.S. 374, 98 S. Ct. 673, 54 L. Ed. 2d 618 (1978).

Of particular importance here, neither the Supreme Court nor this Court has ever found a constitutional right to privacy with respect to the type of information found in motor vehicle records.[8] Indeed, this is the very

[8] The United States cites three Fourth Circuit cases in which it claims a constitutional right to privacy was recognized. First, in *Taylor v. Best*, 746 F.2d 220 (4th Cir. 1984), this Court found that a prisoner did not have a constitutional right to keep his family history private. In *Walls v. City of Petersburg*, 895 F.2d 188 (4th Cir. 1990), this Court held that there was no constitutional right to privacy in information found in a public record. Finally, in *Watson v. Lowcountry Red Cross*, 974 F.2d 482, 487-88 (4th Cir. 1992), this Court, without attempting to define the parameters of a right to privacy, held that the disclosure of an anonymous blood donor's identity to the court and counsel would not violate the privacy

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sort of information to which individuals do not have a reasonable expectation of privacy. First, "pervasive schemes of regulation," like vehicle licensing, must "necessarily lead to reduced expectations of privacy." *California v. Carney*, 471 U.S. 386, 392, 105 S. Ct. 2066, 85 L. Ed. 2d 406 (1985); *cf. New York v. Class*, 475 U.S. 106, 113, 106 S. Ct. 960, 89 L. Ed. 2d 81 (1986) (noting that individuals have a diminished expectation of privacy in matters related to their automobiles).

Second, the same type of information is available from numerous other sources.[9] For example, the identical information can be obtained from public property tax records. As a result, an individual does not have a reasonable expectation that the information is confidential. *See Walls v. City of Petersburg*, 895 F.2d 188, 192 (4th Cir. 1990) (holding that an individual must have a reasonable expectation of confidentiality to have a constitutional right to privacy).

Third, as amici point out, there is a long history in the United States of treating motor vehicle records as

rights of the donor. None of these decisions supports the United States's arguments in this case. Indeed, in *United States v. Bales*, 813 F.2d 1289 (4th Cir. 1987), this Court held that the disclosure of an individual's social security number on a loan application did not violate the individual's constitutional right to privacy. *Id.* at 1297.

[9] If there is a constitutional right to privacy in such information, then the United States is violating the Constitution on an ongoing basis. For example, the United States operates a public database that contains the names, addresses, and medical data of every individual licensed to operate an airplane by the United States. *See* http://www.avweb.com/database/airmen. A related database permits anyone to obtain the name and address of the owner of an airplane simply by providing the number displayed on the airplane's tail. *See* http://www.avweb.com/database/ aircraft.

public records. *See* Brief of Amici Curiae at 5-20.[10] In fact, in *United States Dept. of Health & Human Services v. FLRA*, 833 F.2d 1129 (4th Cir. 1987), this Court observed that an individual's name and home address "is a matter of public record in motor vehicle registration and licensing records." *Id.* at 1135 n. 8.

Finally, such information is commonly provided to private parties. For instance, a State-issued driver's license is often needed to cash a check, use a credit card, board an airplane, or purchase alcohol. We seriously doubt that an individual has a constitutional right to privacy in information routinely shared with strangers.

In sum, the information found in motor vehicle records is not the sort of information to which individuals have a reasonable expectation of privacy. As such, there is no constitutional right to privacy in the information contained in motor vehicle records. Accordingly, Congress did not have the authority under Section 5 of the Fourteenth Amendment to enact the DPPA.

III.

For the reasons stated, the judgment of the district court is affirmed.

AFFIRMED.

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[10] In addition to the briefing we received from the parties, we accepted an amici curiae brief from the States of Alabama, Idaho, and Oklahoma, and the Better Government Bureau, Inc. We thank the amici for their participation.

PHILLIPS, Senior Circuit Judge, dissenting:

Adopted in 1994 as part of larger omnibus crime legislation, the Driver's Privacy Protection Act (DPPA), 18 U.S.C. §§ 2721-25, is a unique federal enactment designed to address the privacy and safety concerns flowing from the unfettered disclosure of personal information contained in drivers' license files maintained by state motor vehicle departments. Pigeonholing the Act into one of two narrow legal constructs that it apparently believes exclusively define the Tenth Amendment's constraints on federal power, the majority concludes that the Act is unconstitutional because it impermissibly regulates States as States and because it is not a law of general applicability to both State and private actors. I dissent, believing that the unique structure and internal operation of the DPPA, considered in light of the harm generated by the States' own actions at which it is aimed, distinguish this case from those upon which the majority relies and compels the conclusion that the Act is consistent with both substantive and structural limitations on the exercise of federal power.[1]

The DPPA makes it unlawful for a department of motor vehicles to "knowingly disclose or otherwise make available to any person or entity personal information . . . in . . . a motor vehicle record." § 2721(a). Exceptions, most of which relate to law enforcement

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[1] Because I believe the DPPA satisfies structural limitations on Congress's exercise of its Commerce Clause power, I do not address the separate question whether other sources of federal power, including Section 5 of the Fourteenth Amendment, are subject to the same structural limitations and if not whether the Government may properly rely on those sources (whatever they may be) here.

and other proper investigative purposes, are enumerated in the Act. *See* § 2721(b). States not wishing to limit themselves to the Act's enumerated exceptions may opt out by affording licensees the opportunity to prohibit disclosure of their personal information. If such an option is provided and license holders do not object, the State may release the information for any purpose. *See* § 2721(b)(11).

State violations of the Act trigger civil penalties. Specifically, § 2723(b) subjects "[a]ny State department of motor vehicles that has a policy or practice of substantial noncompliance with this chapter" to "a civil penalty imposed by the Attorney General of not more than $5,000 a day for each day of substantial noncompliance." Although the Act authorizes a private civil action for damages, States and their agencies may not be sued. *See* § 2724(a) (authorizing a civil action against any "person" who violates the Act); § 2725(2) (defining person to include "an individual, organization, or entity, but . . . not . . . a State or agency thereof"). The Act also prohibits individuals from receiving information for purposes not outlined in the Act or for otherwise receiving such information under false pretenses. *See* § 2723(a). Such acts are prohibited by federal—not state—law, and no State is required to outlaw or punish individuals who improperly receive information or otherwise violate the Act.

Because the DPPA regulates the flow of personal information—information that is consistently in the stream of commerce and for which States receive substantial reimbursement—the only issue in this case is whether Congress may, consistent with the Tenth Amendment, impose its will on States respecting con-

duct uniquely engaged in by States and state actors.[2] It follows that, in exercise of its Commerce Clause powers, Congress could have, had it desired, made receipt of federal highway funds contingent on accepting DPPA's provisions. *See South Dakota v. Dole*, 483 U.S. 203, 206, 107 S. Ct. 2793, 97 L. Ed. 2d 171 (1987) (allowing the Secretary of Transportation to withhold federal highway money from States refusing to raise the legal drinking age). Similarly, Congress could almost assuredly have completely preempted the field of motor vehicle information disclosure, a drastic move that States would undoubtedly resist but on which, in an analogous setting, the Court has placed its seal of approval. *See Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 288, 101 S. Ct. 2352, 69 L. Ed. 2d 1 (1981) (upholding Congress's imposition of a choice between state regulation pursuant to federal guidelines and complete preemption of surface mining). Instead, Congress chose to regulate the States directly, without offering the "incentive" of public funds or threatening to preempt the field.

The majority concedes, as it must, that the end object of the Act is the direct regulation of state conduct. It is not the indirect regulation of private conduct—here information use—by forcing the states directly to regulate that conduct, in the way that the states were

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[2] The district court did not address whether Congress acted within its Commerce Clause power in enacting the DPPA and, as indicated, I assume the point. South Carolina casually asserts on appeal that Congress lacked this power, apparently because there was not a sufficient impact on interstate commerce. The only court to consider this issue directly easily found sufficient evidence of a "nationwide trade of DMV records" to sustain Congress's exercise of its Commerce Clause power. *Pryor v. Reno*, 998 F. Supp. 1317, 1326 (M.D.Ala.1998).

held impermissibly compelled to regulate the waste-handling conduct of private parties in *New York v. United States*, 505 U.S. 144, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (1992). Nor does the Act make South Carolina an executive instrument of the federal government in the way the Brady Act was held impermissibly to have conscripted local law enforcement officials to enforce federal law in *Printz v. United States*, — U.S. ——, 117 S. Ct. 2365, 138 L. Ed. 2d 914 (1997).

It is the direct regulation of the State activity here which distinguishes the DPPA, in the most fundamental of ways, from the federal legislation struck down respectively in *New York* and *Printz*.

Unlike the *New York* legislation, the DPPA does not "commandeer[] the legislative processes of the States by directly compelling them to enact and enforce a *federal* regulatory program." *New York*, 505 U.S. at 176, 112 S. Ct. 2408 (quoting *Hodel*, 452 U.S. at 288, 101 S. Ct. 2352) (emphasis added). It is true that states that choose to disclose motor vehicle information must take steps to administer their programs in conformity with federal guidelines. But that administration will be of their own choosing and will not in any way be a "federal regulatory program." And it is settled that not every kind of federally forced state administration to comply with federal law violates the Tenth Amendment. In *South Carolina v. Baker*, 485 U.S. 505, 108 S. Ct. 1355, 99 L. Ed. 2d 592 (1988), the Court upheld a federally imposed requirement that public bonds issue only in registered form. Although the Tax Equity and Fiscal Responsibility Act of 1982 required States to abandon their previous bearer systems and install completely different administrative programs, the *Baker* Court dismissed South Carolina's argument that this burden

unconstitutionally coerced state officials. The undoubted burden was, explained the Court, simply "an inevitable consequence of regulating a state activity." *Id.* at 514, 108 S.Ct. 1355. The Court went on to say:

> That a State wishing to engage in certain activity must take administrative and sometimes legislative action to comply with federal standards regulating that activity is a commonplace that presents no constitutional defect.

Id. at 515, 108 S. Ct. 1355.

The majority here seeks to avoid *Baker*'s force by characterizing it as a case involving a law of general applicability. In the majority's view, only if the DPPA is also a law of general applicability in the way that the FLSA was considered to be in *Garcia v. San Antonio Metro. Transit Authority*, 469 U.S. 528, 105 S. Ct. 1005, 83 L. Ed. 2d 1016 (1985), the ADEA to be in *EEOC v. Wyoming*, 460 U.S. 226, 103 S. Ct. 1054, 75 L. Ed. 2d 18 (1983), and the Tax Equity Act arguably to be in *Baker*, can it be upheld against Tenth Amendment challenge, and it is not such a law. I disagree with the majority's premise that only laws of such general applicability may be so upheld.

It is true that the laws upheld in *Garcia* and *Wyoming* were laws of general applicability in the sense that they imposed duties equally on state and private actors.[3] And it is true that the Court has

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[3] Actually, the tax provision at issue in *Baker* was not one of general applicability comparable to the "generality" of the FLSA or ADEA. The relevant Act was omnibus tax legislation dedicated to a broad range of tax issues, only one of which was the requirement that bonds issue in registered form. And the only specific provision at issue in *Baker* was one, § 310(b)(1), that removed tax

thought that the states could find adequate protection against this sort of across-the-board federal regulation in the electoral protections afforded by the federal system. *See Printz*, —— U.S. at ——, 117 S. Ct. at 2381 (adequate to preserve the proper balance between state and federal "sphere[s] of authority"). But, the majority fails to explain the theoretical basis or constitutional theory upon which this distinction rests or applies here. Admittedly, when Congress imposes generally applicable obligations upon a State the State is at least partially acting as a market participant and at least in part for this reason must follow federal law in areas of federal concern. But the principal cases noting this feature of the challenged legislation never have intimated that only by such generally applicable legislation may Congress, consistent with the structural limitations of federalism, impose obligations on the states.

I believe that the legislation at issue in *Garcia* and *Wyoming* (and possibly in *Baker*) was immune to Tenth Amendment challenge not so much—if at all—because they applied equally to state and private actors as because they directly regulated state activities rather than using the "States as implements of regulation" of third parties. *New York*, 505 U.S. at 160, 112 S. Ct.

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exemptions only for publicly offered long-term bonds. It therefore imposed a burden only on state and local governments, that is to say only on those groups that issued "public" bonds.

In fact, many of the specific provisions applicable to states under the FLSA have unique application only to government actors. In *West v. Anne Arundel County*, 137 F.3d 752 (4th Cir. 1998), for example, we rejected a Tenth Amendment challenge to a firefighter and law enforcement exception to the overtime provisions of the FLSA, even though "the relevant provisions of the 1974 Amendments targeted only state governmental entities." *Id.* at 758.

2408. *See* Thomas H. Odom, *The Tenth Amendment After Garcia: Process-Based Procedural Protections*, 135 U. Pa. L. Rev. 1657, 1662 (1987) (explaining that *Garcia* "applies only to federal statutes that directly regulate the states"). This, I believe is what most critically distinguishes the legislation upheld in *Garcia*, *Wyoming* and *Baker* from those few examples of invalidated legislation in which Congress took the unusual step of compelling States to invoke their legislative process (*see New York*) or conscripted their executive officials (*see Printz*) in an effort to regulate or circumscribe by indirection the action of third parties. In those cases, the Court confronted a unique question: "[t]hat is, whether Congress may direct or otherwise motivate the States to regulate in a particular field or a particular way." *New York*, 505 U.S. at 160, 112 S. Ct. 2408. That question is not presented by the DPPA. *See* Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 Harv. L. Rev. 2180, 2205 (describing the DPPA as a federal statute that does not "'commandeer' in the sense of requiring state regulation of nongovernmental actors").

The DPPA does not require that states prohibit private individuals from obtaining information in violation of its provisions. Section 2723(a) prohibits this directly by making violation of the DPPA a federal offense. In fact, the DPPA does not require that states act at all. Its provisions only apply once a State makes the voluntary choice to enter the interstate market created by the release of personal information in its files. As did the compelled adoption by the states of a registered bond system, the DPPA only "regulates state activities: it does not . . . seek to control or influence the manner in which States regulate private parties." *Baker*, 485

U.S. at 514, 108 S. Ct. 1355. For this reason, *New York* and *Printz* do not require invalidating this Act.

Nor do I believe that any other constitutionally-based federalism principle, perhaps underlying *Printz* and *New York* at a deeper level, requires its invalidation. This congressional enactment requires only that states choosing to regulate the release of particular information in their possession into the stream of interstate commerce do so in a way Congress deems appropriate. Elected federal officials have made a considered policy determination that unfettered release of this information is not in the public interest because of privacy concerns and because it would be injurious to the interstate market in information. Whether Congress is right or not in that determination is irrelevant. It is sufficient for our purposes that Congress deems injurious a specific state activity in which by definition private actors do not engage. To assume that Congress could only regulate the states' conduct directly if it also equally regulated comparable private conduct (even where none in fact exists) seems to me to bear no relationship to any concept of federalism implicit in the Tenth Amendment as interpreted by the Supreme Court.

In *New York*, the Court explained why the peculiar practices it confronted there offended core notions of state sovereignty while other, perhaps more coercive, action such as field preemption did not:

> [W]here the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished. If the citizens of New York, for example, do not consider that making provision for the disposal of radioactive waste is in their best interest, they may elect state officials who share

> their view. That view can always be preempted under the Supremacy Clause if it is contrary to the national view, but in such a case it is the Federal Government that makes the decision in full view of the public, and it will be federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular.

New York, 505 U.S. at 168, 112 S. Ct. 2408. It is this concern for political accountability that drives the Court's decision in *New York* and provides the theoretical basis and legal authority for invalidating a federal statute that otherwise was within Congress's power to enact. But political accountability is not a concern with the DPPA because with it Congress is doing the regulating and Congress will pay any political price for any resulting electoral disaffection.

Finally, the majority's suggestion that Congress lacks authority to regulate "States as States"—a reference presumably to the now abandoned multifaceted inquiry adopted by the Court in *National League of Cities v. Usery*, 426 U.S. 833, 96 S. Ct. 2465, 49 L. Ed. 2d 245 (1976)—simply has no current force.[4] Pursuant

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[4] In *Hodel*, 452 U.S. at 286, 101 S. Ct. 2352, the Court explained the since rejected theory of *National League of Cities* by quoting language from that decision that closely resembles the majority's understanding of current Tenth Amendment jurisprudence as I read its opinion.

> [W]hen Congress attempts to directly regulate the States as States the Tenth Amendment requires recognition that "there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner."

to Art. VI, cl. 2, the federal government is supreme within its domain. So long as it acts within the substantive constraints imposed by the Constitution, it may direct or forbid the states to do any number of things by either fully or partially exercising its fundamental power of preemption. *See, e.g., Gade v. National Solid Wastes Management Ass'n.*, 505 U.S. 88, 112 S. Ct. 2374, 120 L. Ed. 2d 73 (1992) (sustaining the power of the federal government to limit state attempts to regulate in the field of occupational safety); *Department of Energy v. Ohio*, 503 U.S. 607, 611-12, 112 S. Ct. 1627, 118 L. Ed. 2d 255 (1992) (sustaining the Clean Water Act's regulation and limitation of state authority to control the release of pollutants into waterways); *Federal Energy Regulatory Commission (FERC) v. Mississippi*, 456 U.S. 742, 759-67, 102 S. Ct. 2126, 72 L. Ed. 2d 532 (1982) (affirming the power of the federal government to regulate directly state-run electric and gas utilities).

By regulating directly the actions of states that choose to enter the personal information market, Congress is doing no more than exercising this power of preemption. The DPPA does nothing different from, for example, that done by federal regulation of municipal sewage and state-owned solid waste disposal systems. *See* Robert W. Adler, *Unfunded Mandates and Fiscal Federalism: A Critique*, 50 Vand. L. Rev. 1137, 1156-57 & 1202-03 (1997) (distinguishing direct federal regulation of States from federally imposed requirements that States regulate third parties). Nor is the DPPA's regulation different in critical respects from federal regulation of any number of other state

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Id. at 286-87, 96 S. Ct. 2465 (quoting *National League of Cities*, 426 U.S. at 845, 96 S. Ct. 2465).

activities in areas subject, if Congress chose, to full preemption. One need look no further for an example than to Congress's adoption of the National Voter Registration Act (NVRA) and the subsequent rejection of Tenth Amendment challenges to its provisions. *See ACORN v. Edgar*, 56 F.3d 791 (7th Cir. 1995) (sustaining direct regulation of state voter registration practices under the NVRA); *accord Wilson v. United States*, 878 F. Supp. 1324 (N.D. Cal. 1995). Other examples that come readily to mind might include direct federal regulation of state-owned liquor monopolies or lottery facilities. Surely it is no basis for invalidating such regulations that no private equivalent could be found in the particular area of regulation. Would the requirements of the DPPA really be any less intrusive on state sovereignty interests if they were part of broad privacy protections involving private as well as public holders of sensitive information? *See, e.g.*, Cable Communications Privacy Act, 47 U.S.C. § 551; Electronics Communications Privacy Act, 18 U.S.C. § 2702; Fair Credit Reporting Act, 15 U.S.C. § 1681b; Video Privacy Protection Act, 18 U.S.C. § 2710. I do not see how, hence I do not see how the DPPA's lack of general applicability requires its invalidation.

I would reverse the judgment holding the DPPA unconstitutional as a violation of the Tenth Amendment.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

C.A. No. 3:98-3476-19

CHARLIE CONDON, ATTORNEY GENERAL FOR THE STATE OF SOUTH CAROLINA; STATE OF SOUTH CAROLINA, PLAINTIFFS

AND

SOUTH CAROLINA PRESS ASSOCIATION; VIRGINIA PRESS ASSOCIATION; NORTH CAROLINA PRESS ASSOCIATION; WEST VIRGINIA PRESS ASSOCIATION; MARYLAND/DELAWARE/DISTRICT OF COLUMBIA PRESS ASSOCIATION; NEWSPAPER ASSOCIATION OF AMERICA; AND AMERICAN SOCIETY OF NEWSPAPER EDITORS, INTERVENORS

v.

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES; AND UNITED STATES OF AMERICA, DEFENDANTS

[Filed: Sept. 11, 1997
As Amended: Sept. 16, 1997]

ORDER

SHEDD, District Judge.

In this case of first impression the State of South Carolina and its Attorney General ("the State") chal-

lenge the constitutionality of the "Driver's Privacy Protection Act of 1994" ("the DPPA"), 18 U.S.C. §§ 2721-25, which regulates the dissemination and use of certain information contained in State motor vehicle records, on the grounds that it violates the Tenth and Eleventh Amendments to the United States Constitution.[1] The State seeks a permanent injunction prohibiting enforcement of the DPPA. The United States of America and its Attorney General ("the United States") have filed a motion to dismiss based on their contention that (1) the Court lacks jurisdiction over these claims because of the justiciability concepts of ripeness and standing and, alternatively, (2) these claims fail on their merits because the DPPA was lawfully enacted pursuant to Congress' powers under both the Commerce Clause and § 5 of the Fourteenth Amendment. In turn, the State has moved for summary judgment in its favor.[2] After carefully reviewing this matter, the Court concludes that the DPPA is unconstitutional. Accordingly, the Court will deny the United States' motion to dismiss, grant the State's motion for summary judgment,

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[1] To date, no court appears to have addressed the constitutionality of the DPPA, *cf. Loving v. Reno*, C.A. No. 96-141 (W.D. Okla. Jan. 21, 1997) (dismissing without prejudice First Amendment challenge on grounds of ripeness), and only one other State has challenged the DPPA on constitutional grounds. *See Oklahoma v. United States*, C.A. No. 97-1423R (W.D. Okla. filed Sept. 3, 1997).

[2] At oral argument, both the United States and the State agreed that absent a justiciability problem, a summary judgment ruling (in favor of either party) would be appropriate based on the record presented.

and permanently enjoin the enforcement of the DPPA in the State of South Carolina.[3]

I

Congress enacted the DPPA in 1994 in an effort to remedy what it perceived to be a problem of national concern: *i.e.*, the active commerce in, and consequent easy availability of, personal information contained in State motor vehicle records. Testimony before Congress established that as many as 34 States allowed easy access to personal information contained in motor vehicle records and that criminals had used such information to locate victims and commit crimes.[4] Congress also found that many States sell or otherwise permit

[3] In addition to the State's claims, various media associations, acting as intervenors ("Intervenors"), challenge the DPPA's contitutionality under the First Amendment. The Court's determination under the Tenth Amendment renders it unnecessary to rule on either the State's Eleventh Amendment challenge or Intervenors' First Amendment challenge. *See, e.g., Clinton v. Jones*, — U.S. ——, —— n. 11, 117 S .Ct. 1636, 1642 n. 11, 137 L. Ed. 2d 945 (1997) ("'It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case'") (citation omitted); *Mobil Oil Corp. v. Virginia Gas. Mkt's. & Auto. Repair Assn.*, 34 F.3d 220, 227 (4th Cir. 1994), *cert. denied*, 513 U.S. 1148, 115 S. Ct. 1097, 130 L. Ed. 2d 1065 (1995) ("It is well established that courts should refrain from addressing constitutional questions unless it is necessary to do so"). The Court will dismiss those claims on grounds of mootness.

[4] Perhaps the most publicized incident of this type involved the stalking and eventual murder of actress Rebecca Schaeffer. The Court notes that "preventing and dealing with crime is much more the business of the States than it is of the Federal Government," *Patterson v. New York*, 432 U.S. 197, 201, 97 S. Ct. 2319, 2322, 53 L. Ed. 2d 281 (1977), and South Carolina has enacted anti-stalking legislation. *See* S.C. Code Ann. §§ 16-3-1700 to -1840.

the use of information contained in motor vehicle records for direct marketing purposes.

The DPPA, which is scheduled to become effective on September 13, 1997, generally prohibits "a State department of motor vehicles, and any officer, employee, or contractor, thereof, [from] knowingly disclos[ing] or otherwise mak[ing] available to any person or entity personal information about any individual obtained by the department in connection with a motor vehicle record." 18 U.S.C. § 2721(a).[5] The DPPA specifies a list of exceptions when personal information contained in a State motor vehicle record may be obtained and used. *See* 18 U.S.C. § 2721(b).[6] Additionally, the DPPA permits State motor vehicle departments to:

[5] For purposes of the DPPA "personal information" is defined as "information that identifies an individual, including an individual's photograph, social security number, driver identification number, name, address (but not the 5-digit zip code), telephone number, and medical or disability information, but does not include information on vehicular accidents, driving violations, and driver's status," 18 U.S.C. § 2725(3), and a "motor vehicle record" is defined as "any record that pertains to a motor vehicle operator's permit, motor vehicle title, motor vehicle registration, or identification card issued by a department of motor vehicles." 18 U.S.C. § 2725(1).

[6] The DPPA permits disclosure of personal information from State motor vehicle records to carry out the purposes of various federal statutes; for official use by government agencies; for use in connection with motor-vehicle related matters such as theft and safety; for certain business uses; for use in connection with judicial, agency, or self-regulatory body proceedings; for certain research uses; for use by insurers in connection with claims investigations, anti-fraud activities, rating, and underwriting; for use in identifying owners of towed and impounded vehicles; for certain private investigative or security uses; for use by employers to verify information relating to a holder of commercial driver's license; for

> [E]stablish and carry out procedures under which the department or its agents, upon receiving a request for personal information that does not fall within one of the exceptions in [§ 2721(b)], may mail a copy of the request to the individual about whom the information was requested, informing such individual of the request, together with a statement to the effect that the information will not be released unless the individual waives such individual's right to privacy under [§ 2721].

18 U.S.C. § 2721(d).[7] The DPPA also prohibits "any person [from] knowingly . . . obtain[ing] or disclos[ing] personal information, from a motor vehicle record, for any use not permitted under section 2721(b)," 18 U.S.C. § 2722(a), and from "mak[ing] false representation to obtain any personal information from an individual's motor vehicle record." 18 U.S.C. § 2722(b).

The DPPA provides that "[a]ny State department of motor vehicles that has a policy or practice of substantial noncompliance . . . shall be subject to a civil penalty imposed by the Attorney General of not more than $5,000 a day for each day of substantial noncompliance." 18 U.S.C. § 2723(b). The DPPA also creates a criminal fine, 18 U.S.C. § 2723(a), and a civil cause of

use in connection with private tollways; for use by any requester who has the written consent of the person whose information is sought; and for any state-authorized purpose relating to the operation of a motor vehicle or public safety. The DPPA also permits disclosure for any other use, or for bulk distribution commercial use, if the motor vehicle department provides individuals an opportunity to prohibit such disclosure.

[7] Section 2721(c) governs the resale or redistribution of information lawfully obtained under § 2721(b).

action against a "person"[8] who knowingly violates it. 18 U.S.C. § 2724(a).[9]

South Carolina currently has its own statutory provisions regarding the disclosure and use of its motor vehicle records, and South Carolina's scheme differs significantly from the DPPA. *See* S.C. Code Ann. §§ 56-3-510 to -540. Under South Carolina law a person who requests information contained in South Carolina's motor vehicle records must submit the request on a form provided by the State Department of Public Safety ("the Department")[10] and must specify, *inter alia*, his or her name and the reason for the request, and must certify that the information will not be used for the purpose of telephone marketing or solicitation. S.C. Code Ann. § 56-3-510. The Department must retain all requests for motor vehicle record information for five years and must release a copy of all requests relating to a person upon that person's written request. S.C. Code Ann. § 56-3-520. The Department is authorized to charge a fee for releasing motor vehicle record information, and is required to promulgate certain procedural regulations relating to the release of motor vehicle record information, S.C. Code Ann. § 56-3-530, and to implement procedures to ensure that persons

[8] A "person" under the DPPA is "an individual, organization or entity, but does not include a State or agency thereof." 18 U.S.C. § 2725(2).

[9] The potential remedies include actual and punitive damages, reasonable attorneys' fees and litigation costs, and other preliminary and equitable relief as determined by the court. 18 U.S.C. § 2724(b).

[10] The Department, through its Motor Vehicle Division, is responsible for the maintenance of South Carolina's motor vehicle records. *See* S.C. Code Ann. §§ 23-6-20, -30, and -300.

may "opt-out" and prohibit the use of motor vehicle record information about them for various commercial activities. S.C. Code Ann. § 56-3-540. The undisputed evidence submitted[11] establishes that implementation of the DPPA would impose substantial costs and effort on the part of the Department in order for it to achieve compliance.[12]

II

"Judging the constitutionality of an Act of Congress is properly considered 'the gravest and most delicate duty that [a federal court] is called upon to perform.'" *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 319, 105 S. Ct. 3180, 3188, 87 L. Ed. 2d 220 (1985) (citations and internal quotation marks omitted). The DPPA, like all Acts of Congress, "is to be presumed to be a constitutional exercise of legislative power until the contrary is clearly established," *Close v. Glenwood Cemetery*, 107 U.S. 466, 475, 2 S. Ct. 267, 274, 27 L. Ed. 408 (1883); *see also I.N.S. v. Chadha*, 462 U.S. 919, 944, 103 S. Ct. 2764, 2780-81, 77 L. Ed. 2d 317 (1983) ("We begin, of course, with the presumption that the challenged statute is valid"), and whether the Court considers the DPPA to be a wise law is immaterial to the matter at hand. *See id.* at 944, 103 S. Ct. at 2780-81 (challenged law's "wisdom is not the concern of the courts"). The Court's function is thus limited:

> It is sometimes said that the court assumes a power to overrule or control the action of the people's rep-

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[11] This evidence is contained in the unrebutted affidavit of J. Glenn Beckham, Deputy Director for the Division of Motor Vehicles of the Department.

[12] The Court finds that the State has standing to pursue its claims and that they are ripe.

> resentatives. This is a misconception. The Constitution is the supreme law of the land ordained and established by the people. All legislation must conform to the principles it lays down. When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. [The] court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends.

United States v. Butler, 297 U.S. 1, 62-63, 56 S. Ct. 312, 318, 80 L. Ed. 477 (1936).[13]

A.

The United States first contends that the DPPA is constitutional because Congress enacted it pursuant to

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[13] When "it is acting within the powers granted it under the Constitution, Congress may impose its will on the States." *Gregory v. Ashcroft*, 501 U.S. 452, 460, 111 S. Ct. 2395, 2400, 115 L. Ed. 2d 410 (1991). However, because it "settled that the Constitution . . . is the only source of power authorizing action by any branch of the Federal Government," *Dorr v. United States*, 195 U.S. 138, 140, 24 S. Ct. 808, 809, 49 L. Ed. 128 (1904), Congress, like the other two branches, "possess[es] no power not derived from the Constitution." *Ex parte Quirin*, 317 U.S. 1, 25, 63 S. Ct. 2, 10, 87 L. Ed. 3 (1942).

its power to regulate interstate commerce under the Commerce Clause.[14] The State, while not conceding that there is a sufficient commerce nexus present with respect to State motor vehicle records,[15] nonetheless argues that Congress exceeded its constitutional power and infringed on the sovereignty of the States in enacting the DPPA, thereby violating the Tenth Amendment,[16] because Congress has directed the States to enforce the federal policy embodied in the DPPA by regulating their motor vehicle records. The State relies principally upon two opinions of the Supreme Court—*New York v. United States*, 505 U.S. 144, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (1992), and *Printz v. United States*, —— U.S. ——, 117 S. Ct. 2365, 138 L. Ed. 2d 914 (1997)—both of which struck down congressional legislation. Although the United States maintains that these cases are inapplicable, the Court finds them to be controlling with respect to this issue.[17]

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[14] U.S. Const., Art. I, § 8, cl. 3.

[15] The State asserts in footnote 4 (page 10) of its February 21, 1997, memorandum: "It is doubtful in any event whether [the DPPA] is a valid exercise of the power to regulate commerce. Like the flawed statute in *Lopez v. U.S.* [sic], 514 U.S. 549, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995), it seeks to regulate potential criminal conduct through an attenuated link to interstate commerce."

[16] The Tenth Amendment reads: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

[17] As the Supreme Court noted in *New York*, the question presented—*i.e.*, "whether particular sovereign powers have been granted by the Constitution to the Federal Government or have been retained by the States"—can be viewed in either of two ways:

> In some cases the Court has inquired whether an Act of Congress is authorized by one of the powers delegated to Congress in . . . the Constitution. In other cases the Court has sought to determine whether an Act of Congress invades the province of state sovereignty reserved by the Tenth Amendment. In a case like [this one], involving the division of authority between federal and state governments, the two inquiries are mirror images of each other. If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress.

505 U.S. at 155-56, 112 S. Ct. at 2417.

(1)

In *New York*, the State of New York and two of its counties ("New York") challenged, on Tenth Amendment grounds, federal legislation which required, *inter alia*, the States under certain conditions to take title to low-level radioactive waste generated within their borders. While recognizing that Congress possessed the power under the Commerce Clause to regulate the interstate market in waste disposal, New York argued that the Tenth Amendment limited Congress' power to regulate in this manner because "[r]ather than addressing the problem of waste disposal by directly regulating the generators and disposers of waste, . . . Congress . . . impermissibly directed the States to regulate in this field." 505 U.S. at 160, 112 S. Ct. at 2420. The Supreme Court thus framed the issue in the case as concerning "the circumstances under which Congress may use the States as Implements of regulation; that is, whether Congress may direct or otherwise motivate the States to regulate in a particular field or a particular way." *Id.* at 161, 112 S. Ct. at 2420.

It is unnecessary to restate in detail the historical and constitutional analysis employed by the Supreme

Court. It suffices to say that the Supreme Court's analysis of its prior precedent led it to conclude that "[w]hile Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *Id.* at 162, 112 S. Ct. at 2421. Looking further to historical information concerning the drafting of the Constitution, the Supreme Court then stated that it has

> [A]lways understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts. The allocation of power contained in the Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce.

Id. at 166, 112 S.Ct. at 2423.[18]

Turning to the merits of the take title provision, the Supreme Court concluded:

> The take title provision offers state governments a "choice" of either accepting ownership of waste or regulating according to the instructions of Congress. Respondents do not claim that the Constitution

[18] The Supreme Court noted that Congress does, however, have the ability to "encourage a State to regulate in a particular way, or . . . [to] hold out incentives to the States as a method of influencing a State's policy choices." 505 U.S. at 166, 112 S. Ct. at 2423. Congress did not exercise these options in enacting the DPPA.

> would authorize Congress to impose either option as a freestanding requirement. On one hand[,] the Constitution would not permit Congress simply to transfer radioactive waste from generators to state governments. Such a forced transfer, standing alone, would in principle be no different than a congressionally compelled subsidy from state governments to radioactive waste producers. The same is true of the provision requiring the States to become liable for the generators' damages. Standing alone, this provision would be indistinguishable from an Act of Congress directing the States to assume the liabilities of certain state residents. Either type of federal action would "commandeer" state governments into the service of federal regulatory purposes, and would for this reason be inconsistent with the Constitution's division of authority between federal and state governments. On the other hand, the second alternative held out to state governments—regulating pursuant to Congress' direction—would, standing alone, present a simple command to state governments to implement legislation enacted by Congress. As we have seen, the Constitution does not empower Congress to subject state governments to this type of instruction.
>
> *Because an instruction to state governments to take title to waste, standing alone, would be beyond the authority of Congress, and because a direct order to regulate, standing alone, would also be beyond the authority of Congress, it follows that Congress lacks the power to offer the States a choice between the two. . . . Either way, "the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regula-*

> *tory program," an outcome that has never been understood to lie within the authority conferred upon Congress by the Constitution.*

Id. at 175-76, 112 S. Ct. at 2428 (emphasis added and citation omitted). Importantly, the Supreme Court rejected, *inter alia*, the United States' contention, which is reasserted here (*see infra*) that precedent such as *EEOC v. Wyoming*, 460 U.S. 226, 103 S. Ct. 1054, 75 L. Ed. 2d 18 (1983), *South Carolina v. Baker*, 485 U.S. 505, 108 S. Ct. 1355, 99 L. Ed. 2d 592 (1988), and *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 105 S.Ct. 1005, 83 L. Ed. 2d 1016 (1985) ("the *Garcia* line of cases")—which concerned Congress' authority to subject state governments to generally applicable laws—altered the Tenth Amendment analysis:

> [W]hether or not a particularly strong federal interest enables Congress to bring state governments within the orbit of generally applicable *federal* regulation, no Member of the Court has ever suggested that such a federal interest would enable Congress to command a state government to enact state regulation. *No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate. The Constitution instead gives Congress the authority to regulate matters directly and to preempt contrary state regulation. Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents.*

505 U.S. at 178, 112 S. Ct. at 2429 (emphasis in original and added).

(2)

Printz presented the Supreme Court with another opportunity to consider Congress' power relative to the States. *Printz* was an action brought by two county sheriffs to challenge the constitutionality of a portion of the "Brady Act" which required the "chief law enforcement officer" ("CLEO") of certain localities "to participate, albeit only temporarily, in the administration of a federally enacted regulatory scheme." —— U.S. at ——, 117 S. Ct. at 2369. As the Supreme Court summarized:

> Regulated firearms dealers are required to forward Brady Forms not to a federal officer or employee, but to the CLEOs, whose obligation to accept those forms is implicit in the duty imposed upon them to make "reasonable efforts" within five days to determine whether the sales reflected in the forms are lawful. While the CLEOs are subjected to no federal requirement that they prevent the sales determined to be unlawful (it is perhaps assumed that their state-law duties will require prevention or apprehension), they are empowered to grant, in effect, waivers of the federally prescribed 5-day waiting period for handgun purchases by notifying the gun dealers that they have no reason to believe the transactions would be illegal.

Id. The Supreme Court framed the issue of the case as being the constitutionality *vel non* of "the forced participation of the States' executive in the actual administration of a federal program." *Id.* at ——, 117 S. Ct. at 2376.

It is again unnecessary to restate all of the analysis employed by the Supreme Court. Rather, it is suffi-

cient to note that the Supreme Court read its precedent as clearly establishing that "the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs." *Id.* at ——, 117 S. Ct. at 2380. Moreover, the Supreme Court again rejected the United States' reliance on the *Garcia* line of cases finding those cases to be "inappropriate" "where, as here, it is the whole object of the law to direct the functioning of the state executive . . . ." *Id.* at ——, 117 S. Ct. at 2383 (emphasis in original). The Supreme Court's holding is clear, specific, and powerful:

> We held in *New York* that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the State's officers directly. The federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.

Id. at ——, 117 S. Ct. at 2384.

(3)

The State asserts, and the Court agrees, that the DPPA falls within the prohibition of *New York* and *Printz*. Unquestionably, the States have been, and remain, the sovereigns responsible for maintaining motor vehicle records, and these records constitute

property of the States which they lawfully (and necessarily) maintain. *See United States v. Best*, 573 F.2d 1095, 1103 (9th Cir. 1978) (citation omitted) ("there is little question that the licensing of drivers constitutes 'an integral portion of those governmental services which the States and their political subdivisions have traditionally afforded their citizens'"); *Peel v. Florida Dept. of Transp.*, 600 F.2d 1070, 1083 (5th Cir. 1979) ("Overseeing the transportation system of the state has traditionally been one of the functions of state government, and thus appears to be within the activities protected by the tenth amendment"). In enacting the DPPA, Congress has chosen not to assume responsibility directly for the dissemination and use of these motor vehicle records. Instead, Congress has commanded the States to implement federal policy by requiring them to regulate the dissemination and use of these records. In order to comply with Congress' directive, the States are forced by the threat of administrative penalty (and indirectly by civil and criminal sanction) to take measures to prohibit access by their citizens to the motor vehicle records. This command clearly runs afoul of the holdings of *New York* and *Printz*.

The United States argues that the DPPA is not affected by *New York* and *Printz* because it does not compel the States to "regulate" within the meaning of those cases. The United States reads those cases as stating the proposition that a federal law is prohibited in this instance only if it requires the States to regulate the behavior of their citizens:

> Plaintiffs are correct that Congress cannot "require the States to regulate." *New York*, 505 U.S. at 178 [112 S. Ct. at 2429]. Although Congress may regulate individuals' behavior directly, it cannot tell

> States to regulate individuals' behavior for it. *See New York*, 505 U.S. at 166 [112 S. Ct. at 2423]. "[T]he Commerce Clause . . . authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce." *New York*, 505 U.S. at 166 [112 S. Ct. at 2423]. . . .
>
> The DPPA does not compel States to require or prohibit any acts of their citizens. Nowhere does it order States to regulate how their citizens use, sell, or otherwise redisclose personal information they receive from State department of motor vehicle archives. To the contrary, the DPPA directly regulates individuals' use of that information.

Memorandum In Support Of Motion To Dismiss (Jan. 17, 1997), at 15. This argument misses the mark on at least two points.

First, the United States' reading of *New York* and *Printz* is much too narrow. This fact is best illustrated by *New York* where the take-title provision which the Supreme Court struck down required *no State regulation* of the conduct of its citizens. Under that law, the States were free to refrain from addressing the problem of radioactive waste generated within their borders. Doing so, however, required the States to take title to that waste. As the *New York* court recognized, the "instruction to state governments to take title to waste, standing alone, [is] beyond the authority of Congress. . . ." 505 U.S. at 176, 112 S. Ct. at 2428. The Supreme Court in no way limited its holding to a situation where Congress compelled the States to regulate their citizens' conduct. Second, even assuming, *arguendo*, that the United States' reading of these

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cases is correct, the DPPA falls within its interpretation of an impermissible congressional command for the States to "regulate." The DPPA prohibits the States in many circumstances from disseminating motor vehicle record information. The DPPA thus clearly regulates the conduct of two classes of the States' citizens: the motor vehicle department employees and those citizens wishing to acquire motor vehicle record information.

The United States also asserts that the DPPA is consistent with the *Garcia* line of cases because it "simply represents a federal regulation of business-related activities that substantially affect interstate commerce, activities in which some States happen to be engaging." *Memorandum In Support Of Motion To Dismiss (Jan. 17, 1997)*, at 17. The Court finds the United States' reliance upon the *Garcia* line of cases to be as misplaced as it was in both *New York* and *Printz*. As *New York* and *Printz* make clear, *see supra*, the *Garcia* line of cases is applicable in a case involving consideration of "whether the incidental application to the States of a federal law of general applicability excessively interfere[s] with the functioning of state governments . . . [and not] where, as here, it is the *whole* object of the law to direct the functioning of the state executive." *Printz*, —— U.S. at ——, 117 S. Ct. at 2383 (emphasis in original). This case is unlike, for example, *Garcia*, where the Supreme Court held that Congress lawfully subjected the States, as employers, to the Fair Labor Standards Act. Here, instead of bringing the States within the scope of an otherwise generally applicable law, Congress passed the DPPA specifically to regulate the States' control of their property (*i.e.*, the motor vehicle records) and to require the

States in turn to regulate their citizens' access to and use of these records.

(4)

In short, as *New York* and *Printz* make clear, "[t]he Federal Government may neither issue directives requiring the States to address particular problems, *nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.*" *Printz*, —— U.S. at ——, 117 S. Ct. at 2384 (emphasis added). Regardless of whatever extent Congress may act under the Commerce Clause in the field of motor vehicle records, it clearly exceeded its power thereunder in enacting the DPPA. Therefore, the Court rejects the United States' reliance upon the Commerce Clause as a basis for justifying the constitutionality of the DPPA.

B.

As an alternative basis the United States argues that Congress also was empowered to enact the DPPA by § 5 of the Fourteenth Amendment, which authorizes it to enact legislation to enforce that amendment. Relying primarily upon *Whalen v. Roe*, 429 U.S. 589, 97 S. Ct. 869, 51 L. Ed. 2d 64 (1977), the United States asserts that the Fourteenth Amendment protects the right to privacy by prohibiting the States from publicly disclosing "personal information" contained in State motor vehicle records. As noted, the "personal information" which is restricted by the DPPA is "information that identifies an individual, including an individual's photograph, social security number, driver identification number, name, address (but not the 5-digit zip code), telephone number, and medical or disability

information. . . ." 18 U.S.C. § 2725(3).[19] The State counters the United States' argument with one point: Congress' power under § 5 is limited to enacting legislation to enforce the guarantees of the Fourteenth Amendment, *see Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 732, 102 S. Ct. 3331, 3340, 73 L. Ed. 2d 1090 (1982), and that amendment does not guarantee a right to privacy with respect to the information specified by the DPPA.

(1)

As noted, the United States primarily relies upon *Whalen*, in which the Supreme Court was presented with a constitutional privacy challenge to a State of New York statutory scheme which required the names and addresses of all persons who received prescriptions for certain drugs for which there was both a lawful and an unlawful market to be disclosed to, and recorded by, the State. Framing the issue presented, the Supreme Court stated, *inter alia*:

> Appellees contend that the statute invades a constitutionally protected "zone of privacy." The cases sometimes characterized as protecting "privacy" have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters. . . . Appellees argue that [this] interest[ ] [is] impaired by this statute. The mere existence in readily available form of the information about patients' use of Schedule II drugs creates a genuine concern that the information will become publicly known and that it

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[19] The plain language of this non-exclusive statutory definition makes it clear that the DPPA protects a broad range of information.

> will adversely affect their reputations. . . . Thus, the statute threatens to impair . . . their interest in the nondisclosure of private information.

Id. at 598-600, 97 S. Ct. at 876-77 (footnote omitted).

The Supreme Court rejected this argument based on its conclusion that the record did not establish that the security measures associated with the information would be inadequate to prevent its disclosure. *Id.* at 601-02, 97 S. Ct. at 877-78. The Supreme Court concluded by stating:

> We are not unaware of the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files. The collection of taxes, the distribution of welfare and social security benefits, the supervision of public health, the direction of our Armed Forces, and the enforcement of the criminal laws all require the orderly preservation of great quantities of information, much of which is personal in character and potentially embarrassing or harmful if disclosed. The right to collect and use such data for public purposes is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures. Recognizing that in some circumstances that duty *arguably* has its roots in the Constitution, nevertheless New York's statutory scheme, and its implementing administrative procedures. Evidence a proper concern with, and protection of, the individual's interest in privacy. *We therefore need not, and do not, decide any question which might be presented by the unwarranted disclosure of accumulated private data—whether intentional or unintentional—or by a system that did not contain comparable security provi-*

> *sions.* We simply hold that this record does not establish an invasion of any right or liberty protected by the Fourteenth Amendment.

Id. at 605-06, 97 S. Ct. at 879-80 (emphasis added). In separate concurring opinions, Justices Brennan and Stewart debated whether the government's dissemination of information of the type at issue in *Whalen* would violate a constitutional right to privacy. *Compare id.* at 606, 97 S. Ct. at 879-80 (Brennan, J. concurring) ("Broad dissemination by state officials of such information . . . would clearly implicate constitutionally protected privacy rights, and would presumably be justified only by compelling state interests") *with id.* at 609, 97 S. Ct. at 881 (Stewart, J. concurring) (there is no "general interest in freedom from disclosure of private information").

(2)

Although some federal circuit courts of appeals have questioned whether *Whalen* actually establishes a constitutional right to privacy in the nondisclosure of personal information, *see, e.g., American Fed. of Gov't Employees, AFL-CIO v. Department of H.U.D.*, 118 F.3d 786, 791 (D.C. Cir. 1997) ("We begin our analysis by expressing our grave doubts as to the existence of a constitutional right of privacy in the nondisclosure of personal information"), the Fourth Circuit is not one of them. Instead, the Fourth Circuit has expressly accepted that *Whalen* establishes such a right on at least three occasions: *Taylor v. Best*, 746 F.2d 220, 225 (4th Cir. 1984), *cert. denied*, 474 U.S. 982, 106 S. Ct. 388, 88 L. Ed. 2d 340 (1985); *Walls v. City of Petersburg*, 895

F.2d 188, 192 (4th Cir. 1990), and *Watson v. Lowcountry Red Cross*, 974 F.2d 482 (4th Cir. 1992).[20]

(a)

In *Taylor*, a state prisoner brought a 42 U.S.C. § 1983 claim alleging that his right to privacy was violated because he was compelled to answer questions about his family background. The Fourth Circuit, quoting *Whalen*, stated that "[t]he right to privacy . . . includes an 'individual interest in avoiding disclosure of personal matters.'" 746 F.2d at 225. However, the Fourth Circuit rejected the prisoner's claim, finding that the "compelling public interest in assuring the security of prisons and in effective rehabilitation clearly outweigh[ed] [the prisoner's] interest in maintaining the confidentiality of his family background." *Id.*

(b)

In *Walls*, the Fourth Circuit conducted a more extensive analysis of this privacy right. The plaintiff in *Walls*, who was employed by the City in a law enforcement related capacity, brought a § 1983 privacy claim based on the fact that the City terminated her employment after she refused to answer background questions concerning her family's criminal history, her complete marital history, whether she had ever had homosexual

[20] The Court is aware of Supreme Court and Fourth Circuit cases discussing the right to privacy under the Freedom of Information Act ("FOIA"). These cases have no bearing on the issue presented here because "[t]he question of the statutory meaning of privacy under the FOIA is, of course, not the same as . . . the question whether an individual's interest in privacy is protected by the Constitution." *United States Dept. of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 762 n. 13, 109 S. Ct. 1468, 1476 n. 13, 103 L. Ed. 2d 774 (1989).

relations, and whether she had any outstanding debts. The Fourth Circuit, after quoting the aforementioned language from *Whalen*, stated: "[p]ersonal, private information in which an individual has a reasonable expectation of confidentiality is protected by one's constitutional right to privacy." 895 F.2d at 192. The Fourth Circuit set forth a general standard for determining whether personal information is entitled to privacy protection: *i.e.*, whether the information "is within an individual's reasonable expectations of confidentiality. The more intimate or personal the information, the more justified is the expectation that it will not be subject to public scrutiny." *Id.* The Fourth Circuit then stated that "[t]he right to privacy . . . is not absolute. If the information is protected by a person's right to privacy, then the government has the burden to prove that a compelling governmental interest in disclosure outweighs the individual's privacy interest." *Id.*

The Fourth Circuit proceeded to analyze each of the questions to which the plaintiff objected to determine whether there was a privacy interest implicated and. if so, whether the City's need for the information overrode such interest. The Fourth Circuit, relying upon *Bowers v. Hardwick*, 478 U.S. 186, 106 S. Ct. 2841, 92 L. Ed. 2d 140 (1986), first concluded that no privacy interest was involved with respect to whether the plaintiff had engaged in homosexual relations. 895 F.2d at 193. With respect to the questions concerning the plaintiff's marital history, the Fourth Circuit stated:

> As explained above, a right to privacy protects only information with respect to which the individual has a reasonable expectation of privacy. *Therefore, to the extent that this information is freely available*

> *in public records, the police should be able to require Walls to disclose the information in this background questionnaire. However, any details that are not part of the public record concerning a divorce, separation, annulment, or the birth of children are private and thus protected.*

Id. (emphasis added and citation omitted). The Fourth Circuit concluded that under this standard the marital history and the family criminal history questions violated no privacy interest. Finally, the Fourth Circuit determined that although "[f]inancial information like that requested in the questionnaire is protected by a right to privacy," the City's interest in obtaining that information for purposes of security overrode the plaintiff's privacy interest. *Id.* at 194.

Notably, the Fourth Circuit indicated that its conclusion concerning the financial information was influenced by the fact that City took "precautions to prevent unwarranted disclosure," thereby weakening the plaintiff's privacy interest, and that "if this type of information had been more widely distributed, [its] conclusion might have been different." *Id.* The Fourth Circuit summed up this point:

> In the past few decades, technological advances have provided society with the ability to collect, store, organize, and recall vast amounts of information about individuals in sophisticated computer files. This database capability is already being extensively used by the government, financial institutions, and marketing research firms to track our travels, interests, preferences, habits, and associates. Although some of this information can be useful and even necessary to maintain order and provide communication and convenience in a complex

> society, *we need to be ever diligent to guard against misuse. Some information still needs to be private, disclosed to the public only if the person voluntarily chooses to disclose it.*

Id. at 194-95 (emphasis added).

(c)

In *Watson*, which was a case based on the transfusion of HIV-contaminated blood, the Fourth Circuit was presented with a claim by the HIV-infected blood donor (through the Red Cross) that requiring him to answer sealed discovery interrogatories concerning his personal life violated his right to privacy to avoid the inadvertent disclosure of his identity and to avoid answering embarrassing and harassing questions. 974 F.2d at 487.[21] The Fourth Circuit rejected these claims primarily because of *Whalen*, in which the Supreme Court determined that the remote possibility of public disclosure of the information was insufficient to establish a basis for a violation of the right to privacy. *Id.* at 487-88.[22] The Fourth Circuit specifically noted that it was "leav[ing] for another day the question of whether court-approved disclosure to a larger universe might violate the donor's privacy rights." *Id.* at 488 n. 9.

In a concurring opinion, Judge Widener stated that he did not believe that the donor had any constitutionally protected privacy right "which would protect

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[21] The Fourth Circuit did not seem overly impressed with these asserted privacy rights. *See* 974 F.2d at 487 ("It is difficult . . . to discern the precise nature of the right that the Red Cross is seeking to protect") and 974 F.2d at 489 ("Whatever privacy interests that are involved are protected by the district court's order").

[22] The donor's identity was to be revealed only to the district court and the parties. 974 F.2d at 487.

him against the full disclosure of his knowledge with respect to the disease in himself and others, as well as his physical condition and everything about the taking and handling of his blood," and that the court was not deciding otherwise. *Id.* at 492. In dissent, Judge Russell stated that he believed that the donor's privacy interest outweighed the plaintiff's right to gain access to the information sought through discovery. *Id.* at 492-93.

(3)

While it is clear from the foregoing cases that at least in the Fourth Circuit there is a constitutional right to privacy in the nondisclosure of some form of personal information, the contours of this right are, as the Third Circuit has characterized, at best "murky." *Scheetz v. The Morning Call, Inc.*, 946 F.2d 202, 206 (3d Cir. 1991), *cert. denied*, 502 U.S. 1095, 112 S. Ct. 1171, 117 L. Ed. 2d 417 (1992). Further complicating the matter at hand is the fact that neither *Whalen*, *Taylor*, *Walls*, nor *Watson* involved the precise issue presented here. Each of those cases involved claims by individuals that they should not be *compelled to disclose* certain personal information to a governmental entity because of their right to privacy. Therefore, those cases presented a different question because the United States does not assert here that an individual's privacy right prohibits the States from requiring their citizens *to provide* the "personal information" specified in the DPPA to the State motor vehicle departments. Indeed, the United States (and the DPPA itself) implicitly concedes that an individual's privacy right in this information is outweighed by the States' interest in obtaining this information. The United States instead takes the privacy question one step further; that is, it asserts that the

privacy interest at stake here is the right to have the government not *publicly disseminate* the validly obtained information contained in the State motor vehicle records.

In *Whalen*, *Watson*, and *Walls* the courts specifically avoided any meaningful consideration of whether public dissemination of the personal information involved in those cases may have affected their outcome. *See Whalen*, 429 U.S. at 605-06, 97 S. Ct. at 879-80; *Watson*, 974 F.2d at 488 n. 9; *Walls*, 895 F.2d at 194. The United States has not pointed to any case in which either the Supreme Court or the Fourth Circuit has found a constitutional privacy violation based on public dissemination of personal information by the government. *Cf. Opinion of the Justices to the Senate*, 423 Mass. 1201, 668 N.E.2d 738, 757 (1996) (footnotes omitted) ("The Justices know of no case decided by . . . the Supreme Court where the constitutional right to privacy was found to have been violated by a governmental disclosure of information properly in its possession that the individual would rather not have disseminated").[23]

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[23] In at least one case, the Supreme Court has held that an individual's constitutional right to privacy was not violated by the government's public disclosure of the fact of an arrest:

> [Respondent] claims constitutional protection against the disclosure of the fact of his arrest on a shoplifting charge. His claim is based, not upon any challenge to the State's ability to restrict his freedom of action in a sphere contended to be "private," but instead on a claim that the State may not publicize a record of an official act such as an arrest. None of our substantive privacy decisions hold this or anything like this, and we decline to enlarge them in this manner.

Paul v. Davis, 424 U.S. 693, 713, 96 S. Ct. 1155, 1166, 47 L. Ed. 2d 405 (1976). *Paul* predated *Whalen* and it involved the publication of an arrest, an event which unquestionably is considered a matter

From the cases discussed above, it seems certain that an individual's interest in not having certain personal information disseminated by the government is at least equal to, and probably greater than, his interest in merely avoiding disclosure of that information to the government. However the distinction to be made between the two interests likely lies in the balancing to be done between the individual's privacy right and the government's need for disclosure. That is, the government likely would need to demonstrate a greater interest for disseminating personal information than it would for obtaining that same information. Of course, a prerequisite to either balancing process is an initial determination that the information is, in fact, the type of information that is protected under the Constitution.

Therefore, in a case such as this one involving the *Whalen* right to privacy against the nondisclosure of personal information, the Court must, depending on the specific circumstances, potentially conduct a multi-pronged analysis. First, the Court must examine the personal information at issue to determine whether, in fact, it is within a person's "reasonable expectation of confidentiality" and thus entitled to the constitutional right of privacy. If the information is not entitled to such protection, the inquiry ends. If the information is entitled to such protection, the Court next must determine whether the State's interest in obtaining the information from the individual outweighs the individual's privacy interest. *See Walls*, 895 F.2d at 192. Again, if the answer here is negative, then the inquiry ends. However, if the answer is affirmative, then the Court must proceed to determine whether the State's

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of public interest. *Paul* therefore is not particularly pertinent to this case.

interest in allowing the information to be made public outweighs the individual's privacy interest. As noted, this latter inquiry sorely requires the States to present a higher interest than they must show to obtain personal information.

The Court's reason for explaining this analysis is based on the record presented in, and the posture of, this case. As noted, the DPPA implicitly recognizes that to whatever extent there is a privacy interest in any of the personal matters required to be disclosed by individuals to State motor vehicle departments, the States' interest in obtaining the information outweighs that privacy interest.[24] While there is thus no need for the Court to engage in balancing the States' interest in obtaining personal information against the individuals' right of privacy, there is a need for the Court to balance the States' interest in publicly disseminating the motor vehicle record information against the individuals' privacy interest. Unfortunately for the State, it has offered no specific interest (other than historical) to justify its need to allow its motor vehicle records to be publicly disseminated. Therefore, the entire inquiry for purposes of this case involves only the threshold question of whether the information protected by the DPPA is the type of personal information for which the Constitution recognizes a right to privacy.

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[24] Of course, any specific information sought by a State motor vehicle department could potentially be challenged under *Whalen*. However, that is not an issue before the Court. The Court notes that Congress' enactment of numerous exceptions to the purported right of privacy protected by the DPPA weighs against the United States' position that there is a protected privacy interest involved here.

(4)

In this Circuit, *Walls* is the key case for making this inquiry. As noted, the Fourth Circuit stated in *Walls* that "the first step in determining whether the information sought is entitled to privacy protection . . . [is] whether it is within an individual's reasonable expectations of confidentiality. The more intimate or personal the information, the more justified is the expectation that it will not be subject to public scrutiny." 895 F.2d at 192. In ruling on the specific information in that case, the Fourth Circuit further indicated that information that is freely available in public records is not protected by a right to privacy. *Id.* at 193-94.[25]

As the Court has previously noted, the DPPA's definition of "personal information" that is protected from disclosure thereunder is extremely broad: personal information is "information that identifies an individual . . . ." 18 U.S.C. § 2725(3). To be sure, the statutory definition lists several things which are to be considered as being within the category of "information that identifies an individual," but the definition is facially open-ended. This is significant because it

[25] Recently, in *Russell v. Gregoire*, 1997 WL 539074, *16 (9th Cir. Sept. 4, 1997), the Ninth Circuit rejected a constitutional privacy challenge to the State of Washington's version of "Megan's law," finding that "any such right to privacy, to the extent that it exists at all, would protect only personal information . . . [and] [t]he information collected and disseminated by the Washington statute is already fully available to the public and is not constitutionally protected. . . ." The Ninth Circuit noted that although there were two types of information that would be collected and/or disseminated under the law that were not fully available to the public—the offender's residence and employer—"[n]either of these two items are [sic] generally considered private." *Id.*

straightaway undercuts the United States' position that the DPPA protects the privacy interest recognized by the Constitution.[26] Under the United States' view, virtually all information maintained by a State in its motor vehicle records—except for those specific items that the DPPA excludes—would have to be considered, *automatically*, as being within the constitutional right to privacy.[27] Of course, this cannot be accurate, at least in the Fourth Circuit, because *Walls* clearly establishes, for example, that information that is otherwise freely available in public records is not constitutionally protected.[28]

Once it is accepted that not all "personal information" contained in the records of the State motor vehicle departments can be considered constitutionally protected, the question becomes whether any of this information is so protected. Instead of engaging in pure speculation as to what information may arguably fall within the DPPA's broad ambit, the Court will limit its focus to those specific examples identified in the DPPA as being "personal information." In doing so, the Court

[26] At oral argument the United States asserted that each type of information protected by the DPPA is equal with respect to the constitutional privacy interest.

[27] It is likely that the United States would argue that the term "personal information" must be given a broad construction.

[28] While neither party has presented the Court with information establishing what *any* State keeps in its motor vehicle records, it is conceivable that the marital status of an individual, either directly or indirectly as a "next of kin" requirement, is an item of information which a State motor vehicle department may now (or in the future could) require for notification purposes in the event of an automobile accident. Marital status is, as noted, the type of information which the Fourth Circuit in *Walls* held is not constitutionally protected under the right to privacy.

may quickly dispose of five items specified in the DPPA: name, driver identification number, address, phone number, and photograph. These are clearly not the type of intimate matters for which individuals have a "reasonable expectation of confidentiality" that the Constitution protects.[29]

The DPPA also specifies that "medical or disability information" is "personal information" that comes within its scope. While the Court has no doubt (in light of Circuit precedent) that individuals have a privacy interest in some—perhaps most—medical or disability information, there clearly is some medical or disability information for which there is no privacy interest. For example, the fact that an individual wears eyeglasses (a likely item of information in motor vehicle records) is not an intimate personal matter since it is obvious to anyone who sees that individual. Likewise, the fact that a person needs to use a wheelchair (also likely to be in motor vehicle records)[30] is an obvious item of disability information which does not involve an intimate matter. There is no need to belabor this point with

[29] In South Carolina, for example, an individual's name, address, driver identification number, and photograph appear on the driver's license, which has become a common source of information for a variety of purposes (*e.g.*, proof of age and identity). Moreover, an individual's name and address is generally readily attainable from a variety of sources, including public records (*e.g.*, voting registration lists, mortgage records). Finally, an individual can claim no privacy interest in his appearance, which is, of course, reflected in the photograph.

[30] The State of South Carolina issues disability license tags which clearly identify persons who have certain disabilities that qualify them for that tag. Not only do these tags expose the fact of a disability to the public, but their issuance also makes it likely that, for example, an individual's need to use a wheelchair is contained in the motor vehicle records.

additional examples. The phrase "medical or disability information" is so broad that it encompasses a seemingly infinite set of information, only some of which is in fact entitled to privacy protection. Therefore, although the Court has contemplated whether the "medical or disability information" provision could be retained and upheld while other items specified in the DPPA were severed therefrom, the Court finds that the breadth of the provision makes it practically unworkable. Since the Court has no basis in this record to establish the parameters of what "medical or disability information" is entitled to constitutional protection, it is certainly not reasonable to expect laypersons subject to civil and criminal sanction under the DPPA to be able to make this determination on an *ad hoc* basis.

The only remaining item of information specified in the DPPA is an individual's social security number. Regardless of the extent, if any, to which there is a *constitutional* right to privacy in social security numbers, the Court finds that retaining this portion of the DPPA while severing the remainder is not warranted. The procedural history of the DPPA makes it clear that its main purpose was to prohibit the disclosure of names and addresses in order to prevent persons from being identified by the motor vehicle records. While Congress added social security numbers to the list of information which is covered by the DPPA, that information clearly seems peripheral to the DPPA's purpose. Accordingly, the Court finds that the DPPA will not "function in a manner consistent with the intent of Congress," *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685, 107 S. Ct. 1476, 1480, 94 L. Ed. 2d 661 (1987), if the social security number portion is retained while the remainder is severed.

(5)

In short, the Court finds that Congress' purported reliance on § 5 of the Fourteenth Amendment in enacting the DPPA is misplaced because the United States has failed to establish that the DPPA is legislation which properly enforces that amendment's guarantee of the right to privacy. To be sure, some of the matters that the DPPA protects may be considered "personal" in a general sense. However, the question is whether these matters are entitled to privacy protection under the Constitution. On the record presented, the Court is unable to find that they are.

III

Based on the foregoing the Court hereby **ORDERS** on this the 11th day of September, 1997, at Columbia, South Carolina, that the United States' motion to dismiss be **DENIED**, the State's motion for summary judgment be **GRANTED**, and that the United States be **PERMANENTLY ENJOINED** from enforcing the DPPA in the State of South Carolina. The Court **DIRECTS** the Clerk to telefax (or otherwise provide immediate access to) a copy of this Order to the parties immediately upon filing. The Court **DISMISSES** all claims not addressed herein as being moot.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

No. 97-2554
CA-96-3476-3-19

CHARLIE CONDON, ATTORNEY GENERAL FOR THE STATE OF SOUTH CAROLINA; STATE OF SOUTH CAROLINA, PLAINTIFFS-APPELLEES

AND

SOUTH CAROLINA PRESS ASSOCIATION; VIRGINIA PRESS ASSOCIATION; NORTH CAROLINA PRESS ASSOCIATION; WEST VIRGINIA PRESS ASSOCIATION; MARYLAND/DELAWARE/DISTRICT OF COLUMBIA PRESS ASSOCIATION; NEWSPAPER ASSOCIATION OF AMERICA; SOCIETY OF NEWSPAPER EDITORS, INTERVENORS-PLAINTIFFS

v.

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES; UNITED STATES OF AMERICA, DEFENDANTS-APPELLANTS

BETTER GOVERNMENT BUREAU, INCORPORATED; STATE OF ALABAMA; STATE OF OKLAHOMA; STATE OF IDAHO; STATE OF NORTH CAROLINA, AMICI CURIAE

ON PETITION FOR REHEARING AND REHEARING EN BANC

Appellants filed a petition for rehearing and rehearing en banc.

Judges Williams, Hamilton and Senior Judge Phillips voted to deny the petition for rehearing.

A member of the Court requested a poll on the petition for rehearing en banc. The poll failed to produce a majority of judges in active service in favor of rehearing en banc.

Judges Murnaghan, Ervin, Hamilton, Michael, Motz and King voted to rehear the case en banc, and Judges Wilkinson, Widener, Wilkins, Niemeyer, Luttig, Williams and Traxler voted against rehearing en banc.

The Court denies the petition for rehearing and rehearing en banc.

Entered at the direction of Judge Williams for the Court.

For the Court,

/s/ PATRICIA S. CONNOR
PATRICIA S. CONNOR
CLERK

APPENDIX D

The Driver's Privacy Protection Act of 1994, 18 U.S.C. 2721-2725, provides:

§ 2721. Prohibition on release and use of certain personal information from State motor vehicle records

(a) IN GENERAL.—Except as provided in subsection (b), a State department of motor vehicles, and any officer, employee, or contractor, thereof, shall not knowingly disclose or otherwise make available to any person or entity personal information about any individual obtained by the department in connection with a motor vehicle record.

(b) PERMISSIBLE USES.—Personal information referred to in subsection (a) shall be disclosed for use in connection with matters of motor vehicle or driver safety and theft, motor vehicle emissions, motor vehicle product alterations, recalls, or advisories, performance monitoring of motor vehicles and dealers by motor vehicle manufacturers, and removal of non-owner records from the original owner records of motor vehicle manufacturers to carry out the purposes of titles I and IV of the Anti Car Theft Act of 1992, the Automobile Information Disclosure Act (15 U.S.C. 1231 et seq.), the Clean Air Act (42 U.S.C. 7401 et seq.), and chapters 301, 305, and 321-331 of title 49, and may be disclosed as follows:

(1) For use by any government agency, including any court or law enforcement agency, in carrying out its functions, or any private person or entity acting on behalf of a Federal, State, or local agency in carrying out its functions.

(2) For use in connection with matters of motor vehicle or driver safety and theft; motor vehicle emissions; motor vehicle product alterations, recalls, or advisories; performance monitoring of motor vehicles, motor vehicle parts and dealers; motor vehicle market research activities, including survey research; and removal of non-owner records from the original owner records of motor vehicle manufacturers.

(3) For use in the normal course of business by a legitimate business or its agents, employees, or contractors, but only—

(A) to verify the accuracy of personal information submitted by the individual to the business or its agents, employees, or contractors; and

(B) if such information as so submitted is not correct or is no longer correct, to obtain the correct information, but only for the purposes of preventing fraud by, pursuing legal remedies against, or recovering on a debt or security interest against, the individual.

(4) For use in connection with any civil, criminal, administrative, or arbitral proceeding in any Federal, State, or local court or agency or before any self-regulatory body, including the service of process, investigation in anticipation of litigation, and the execution or enforcement of judgments and orders, or pursuant to an order of a Federal, State, or local court.

(5) For use in research activities, and for use in producing statistical reports, so long as the personal

information is not published, redisclosed, or used to contact individuals.

(6) For use by any insurer or insurance support organization, or by a self-insured entity, or its agents, employees, or contractors, in connection with claims investigation activities, antifraud activities, rating or underwriting.

(7) For use in providing notice to the owners of towed or impounded vehicles.

(8) For use by any licensed private investigative agency or licensed security service for any purpose permitted under this subsection.

(9) For use by an employer or its agent or insurer to obtain or verify information relating to a holder of a commercial driver's license that is required under chapter 313 of title 49.

(10) For use in connection with the operation of private toll transportation facilities.

(11) For any other use in response to requests for individual motor vehicle records if the motor vehicle department has provided in a clear and conspicuous manner on forms for issuance or renewal of operator's permits, titles, registrations, or identification cards, notice that personal information collected by the department may be disclosed to any business or person, and has provided in a clear and conspicuous manner on such forms an opportunity to prohibit such disclosures.

(12) For bulk distribution for surveys, marketing or solicitations if the motor vehicle department has

implemented methods and procedures to ensure that—

(A) individuals are provided an opportunity, in a clear and conspicuous manner, to prohibit such uses; and

(B) the information will be used, rented, or sold solely for bulk distribution for surveys, marketing, and solicitations, and that surveys, marketing, and solicitations will not be directed at those individuals who have requested in a timely fashion that they not be directed at them.

(13) For use by any requester, if the requester demonstrates it has obtained the written consent of the individual to whom the information pertains.

(14) For any other use specifically authorized under the law of the State that holds the record, if such use is related to the operation of a motor vehicle or public safety.

(c) RESALE OR REDISCLOSURE.—An authorized recipient of personal information (except a recipient under subsection (b)(11) or (12)) may resell or redisclose the information only for a use permitted under subsection (b) (but not for uses under subsection (b) (11) or (12)). An authorized recipient under subsection (b)(11) may resell or redisclose personal information for any purpose. An authorized recipient under subsection (b)(12) may resell or redisclose personal information pursuant to subsection (b)(12). Any authorized recipient (except a recipient under subsection (b) (11)) that resells or rediscloses personal information covered by this chapter must keep for a period of 5 years records identifying each person or entity that receives information and the permitted purpose for which the

information will be used and must make such records available to the motor vehicle department upon request.

(d) WAIVER PROCEDURES.—A State motor vehicle department may establish and carry out procedures under which the department or its agents, upon receiving a request for personal information that does not fall within one of the exceptions in subsection (b), may mail a copy of the request to the individual about whom the information was requested, informing such individual of the request, together with a statement to the effect that the information will not be released unless the individual waives such individual's right to privacy under this section.

§ 2722. Additional unlawful acts

(a) PROCUREMENT FOR UNLAWFUL PURPOSE.—It shall be unlawful for any person knowingly to obtain or disclose personal information, from a motor vehicle record, for any use not permitted under section 2721(b) of this title.

(b) FALSE REPRESENTATION.—It shall be unlawful for any person to make false representation to obtain any personal information from an individual's motor vehicle record.

§ 2723. Penalties

(a) CRIMINAL FINE.—A person who knowingly violates this chapter shall be fined under this title.

(b) VIOLATIONS BY STATE DEPARTMENT OF MOTOR VEHICLES.—Any State department of motor vehicles that has a policy or practice of substantial noncompliance with this chapter shall be subject to a

civil penalty imposed by the Attorney General of not more than $5,000 a day for each day of substantial noncompliance.

§ 2724. Civil action

(a) CAUSE OF ACTION.—A person who knowingly obtains, discloses or uses personal information, from a motor vehicle record, for a purpose not permitted under this chapter shall be liable to the individual to whom the information pertains, who may bring a civil action in a United States district court.

(b) REMEDIES.—The court may award—

(1) actual damages, but not less than liquidated damages in the amount of $2,500;

(2) punitive damages upon proof of willful or reckless disregard of the law;

(3) reasonable attorneys' fees and other litigation costs reasonably incurred; and

(4) such other preliminary and equitable relief as the court determines to be appropriate.

§ 2725. Definitions

In this chapter—

(1) "motor vehicle record" means any record that pertains to a motor vehicle operator's permit, motor vehicle title, motor vehicle registration, or identification card issued by a department of motor vehicles;

(2) "person" means an individual, organization or entity, but does not include a State or agency thereof; and

(3) "personal information" means information that identifies an individual, including an individual's photograph, social security number, driver identification number, name, address (but not the 5-digit zip code), telephone number, and medical or disability information, but does not include information on vehicular accidents, driving violations, and driver's status.

Supreme Court, U.S.
FILED
APR 13 1999
CLERK

No. 98-1464

In the Supreme Court of the United States

OCTOBER TERM, 1998

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, ET AL., PETITIONERS,

v.

CHARLIE CONDON, ATTORNEY GENERAL FOR THE STATE OF SOUTH CAROLINA, ET AL., RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM OF RESPONDENTS CHARLIE CONDON AND STATE OF SOUTH CAROLINA

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the Driver's Privacy Protection Act of 1994, 18 U.S.C. §§ 2721-2725, violates the Tenth Amendment.

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No. 98-1464

In the Supreme Court of the United States

OCTOBER TERM, 1998

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, ET AL., PETITIONERS,

v.

CHARLIE CONDON, ATTORNEY GENERAL FOR THE STATE OF SOUTH CAROLINA, ET AL., RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM OF RESPONDENTS CHARLIE CONDON AND STATE OF SOUTH CAROLINA

Respondents Charlie Condon and the State of South Carolina do not oppose the granting of the writ of certiorari in this case.[1] The court of appeals in this case declared the Driver's Privacy Protection Act of 1994 (DPPA), 18 U.S.C. §§ 2721 - 2725 unconstitutional, as

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[1] Respondents Condon and State of South Carolina (hereinafter simply "Respondents") were the only active plaintiffs (appellees) in the Court of Appeals. The other respondents listed in the Petition are various media organizations who intervened to raise First Amendment claims. The district court dismissed their claims as moot, Pet. App. 40a n.3 and 72a. These organizations did not seek to participate as parties in the court of appeals, and that court denied their motion to file an amicus curiae brief on the First Amendment issues. Pet. App. 2a n.1.

Respondents had urged. The four circuits in which the issue has arisen are evenly split in their results.[2] Clearly, a decision of this Court is necessary to resolve the present inconsistency in the enforceability of this statute in different regions of the country.

While not opposing certiorari, Respondents Condon and the State of South Carolina suggest, as set forth more fully at the end of this Memorandum, that the question presented by Petitioner is considerably broader than the points actually argued in the Petition. The Petition argues only Tenth Amendment issues, but Petitioner's statement of the question is capable of a broader construction.

Also set forth herein are a Counterstatement of the Case and a brief statement of Respondents' position on the merits of the issues presented by the Petition.

COUNTERSTATEMENT OF THE CASE

1. *Procedural History.*

In this action, the State of South Carolina and its Attorney General challenged the constitutionality of the

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[2] In the present case and in *Pryor v. Reno*, 1999 WL 187050 (11th Cir. 4/6/99), the DPPA was held unconstitutional. In *Travis v. Reno*, 163 F.3d 1000 (7th Cir. 1998) and *Oklahoma v. United States*, 161 F.3d 1266 (10th Cir. 1998), the constitutionality of the Act was sustained. As far as counsel is aware, no challenges to the DPPA are presently pending in any other circuit.

DPPA. The district court held that the Act violated the Tenth Amendment, and enjoined its application shortly before it was scheduled to take effect in September 1997. Pet. App. 38a-56a, 72a. The district court further held that the DPPA could not be sustained as a valid exercise of Congress's power under Section 5 of the Fourteenth Amendment. Pet. App. 56a-72a. The court of appeals affirmed on both grounds. Pet. App. 1a-26a. In its Petition for Certiorari, the Government does not argue, and apparently waives, the contentions it made below concerning Section 5 of the Fourteenth Amendment.

2. *The Driver's Privacy Protection Act.*

The DPPA consists of a command by Congress to the States not to disclose specified information in driver's license and motor vehicle records, followed by a long list of exceptions. The general rule against disclosure, if a rule so exception-ridden can be said to be general at all, is found in 18 U.S.C.§ 2721(a). The exceptions are set forth in 18 U.S.C. § 2721(b)(1) through –(b)(14).

The Act also contains several provisions which require the States to disclose personal information from DMV databases for certain purposes. 18 U.S.C. §2721(b). Although the Government argues that the Act "does not require any affirmative act by state motor vehicle agencies," Pet. 5, this section would appear to provide to the contrary. The Eleventh Circuit in *Pryor v. Reno*, *supra*, 1999 WL 187050 at *1, *4, concluded that this part of the Act "requires" the States to make disclosures under the

listed circumstances.[3]

The administration of the statute is made complicated by the number and nature of the many exceptions. Some involve use of the records in the operation of governments and businesses. See, e.g., 18 U.S.C. § 2721(b)(1), –(b)(2), –(b)(4) (permissible to release records to government agencies exercising law enforcement and other functions); 18 U.S.C. § 2721(b)(3) (permissible to release records to "a legitimate business," but only for certain purposes). Other exceptions which 18 U.S.C. § 2721(b) permits to the general rule of nondisclosure include disclosure to insurers, disclosure to towing services, disclosure to licensed private investigators or security services, and disclosure in connection with commercial drivers and toll transportation facilities. 18 U.S.C. § 2721(b)(6), –(b)(7), –(b)(8), –(b)(9) and –(b)(10). Disclosure by consent of an individual is permitted by 18 U.S.C. § 2721(b)(13). In 18 U.S.C. § 2721(b)(11), Congress authorizes unlimited individual disclosures of the records by the States, so long as the States have first provided motor vehicle owners a clear and conspicuous way to prohibit such disclosures. Even when the States have received permission from owners to make unlimited *individual* disclosures under 18 U.S.C. § 2721(b)(11), however, the States still may not make *bulk* disclosures of motor vehicle information unless

[3] The Attorney General of California has concluded that the Act requires disclosures of matters which under California law had previously not been subject to disclosure. 79 Op. Cal. Att'y. Gen. 76 (1996).

the States first provide individuals "an opportunity, in a clear and conspicuous manner, to prohibit such uses," i.e., uses involving bulk disclosures. 18 U.S.C. § 2721(b)(12)(A). The last of the fourteen exceptions permits disclosure "for any other use specifically authorized under the law of the State that holds the record," but only if "such use is related to the operation of a motor vehicle or public safety." 18 U.S.C. § 2721(b)(14). The court in *Pryor v. Reno, supra,* concluded after reciting this list of exceptions that "Congress riddled the Act with more holes than Swiss cheese." 1999 WL 187050 at *3.

This complex Congressional directive to the States would require considerable effort to administer in practice. An employee or official of a Department of Motor Vehicles would need to review each specific request in order to make a judgment whether the requested disclosure is mandated by the Act, prohibited by the Act, or permitted (in whole or in part) by one of the many exceptions. A state official would thus need to make judgment calls about the statute's application.[4] That state official would be the person who would be seen as granting or denying the request and who could bear the blame for any errors.

The state official could receive more than simply

[4] The Eleventh Circuit has pointed out that the Act "contains no explicit instructions regarding the extent to which the state officer must investigate and confirm the accuracy of the claims made by individuals requesting the information." *Pryor, supra,* 1999 WL 187050 at *4.

blame for erroneous decisions about whether to disclose or withhold information. The Act creates potentially severe federal penalties for erroneous decisions by state officials. A state DMV employee or official who "knowingly violates this chapter" can be charged with a federal crime and fined if found guilty. 18 U.S.C. § 2723(a). In addition, 18 U.S.C. § 2724 exposes state officials and employees to the full plethora of federal civil remedies if such persons can be proven to have knowingly disclosed personal information from a motor vehicle record for a purpose not permitted under the Act. These remedies include actual damages of a minimum of $2,500, punitive damages if the disclosure is willfully or recklessly made, attorneys' fees, and equitable relief.[5]

South Carolina's response to the problem of potential misuse of the information in DMV databases has been to enact legislation which requires a person requesting such information to sign a form which lists the requestor's name and the reason for the request. *S.C. Code Ann.* §56-3-510 (Cum Supp. 1999). These forms are kept for five years. Any person whose motor vehicle information is disclosed may examine the form signed by

[5] In South Carolina seventy field offices have full access to the federally-proscribed records. Many or most other States undoubtedly have the same widespread access to records by field offices. Considerable training of numerous persons would be required in order for the State to try to avoid unintentional erroneous disclosures by its officials and employees. C.A. App. 17. It was undisputed below that the Act would impose substantial cost and effort on the DMV in order to obtain compliance. *See* Pet. App. 44a.

the person who requested to see the information. *S.C. Code Ann.* §56-3-520 (Cum Supp. 1999).[6] These statutes were enacted in 1996; the courts of South Carolina have not yet had occasion to decide whether they prohibit the bulk sale of information in the DMV databases.[7]

[6] South Carolina law also makes stalking a criminal offense, *S.C. Code Ann.* §§ 16-3-1700, *et seq.*, and increases the penalty if DMV records were used by the stalker. *S.C. Code Ann.* §§ 16-3-1710(C), 16-3-1720(C).

[7] A temporary provision enacted in South Carolina in 1997 and 1998 permitted the bulk sale of drivers' license information, including digitized photographs, for the prevention of fraud. S.C.Act No. 155 of 1997, Part I, § 34.15; Act No. 419 of 1998, Part I, § 36.12. The state Department of Public Safety contracted with a private company for the sale of this information. Had the DPPA been in effect in South Carolina, it would not have affected this transaction; 18 U.S.C. § 2721(b)(3) permits disclosures for such purposes as fraud prevention.

The sale of the drivers' photograph database in South Carolina and in two other states eventually became the subject of considerable publicity. *See, e.g.*, Washington Post, Jan. 22, 1999 at A01. The Attorney General of South Carolina, one of the Respondents in this case, challenged the release of this database in state court, citing the state constitutional provision protecting the right to privacy. *S.C. Const.* Art. I, § 10. Preliminary relief was denied, but the case is still pending as of this writing. *Condon v. Image Data, LLC*, No. 99-CP-40-0290 (Richland Co., S.C., Court of Common Pleas). Eventually the Governor of South Carolina terminated the contract of sale in March 1999. This controversy has directed the attention of the South Carolina General Assembly to database privacy issues; at a minimum, it is unlikely that the temporary provisions cited above will be renewed.

THE PETITION SHOULD BE GRANTED IN ORDER FOR THE COURT TO CONFIRM THAT THE DPPA IS UNCONSTITUTIONAL

1. In *New York v. United States*, 506 U.S. 144 (1992) and Printz v. United States, 117 S.Ct. 2365 (1997), this Court unequivocally condemned federal legislation which seeks to use the States as the implementors of Congress's policy choices:

> "We . . . conclude categorically, as we concluded categorically in *New York*: 'The Federal Government may not compel the States to enact *or administer* a federal regulatory program.' *Id.*, at 188."

Printz, 117 S.Ct. at 2383 (emphasis added). *Printz* makes frequent reference to the Tenth Amendment's prohibition of federal statutes that require States to administer federal programs. 117 S.Ct. at 2371 n.2., 2374 n. 8, 2378 n.12, 2380, 2381, 2384. The courts of appeals in this case and in *Pryor v. Reno* both held that the vice of the DPPA was that it required the States to administer its provisions. Pet. App. 14a-15a; 1999 WL 187050 at *4 - *5. Respondents submit that this case involves only the straightforward application of the principles set forth in *New York* and *Printz*, as the Fourth and Eleventh Circuits have held.

The Government cannot reasonably deny that the DPPA requires state officials to administer its provisions, and it puts little effort into attempting such a denial. The

practical reality of the matter is that the DPPA commands the States to maintain a broad and ongoing administrative effort. A typical application of the DPPA would occur when a person requests information from a state DMV about a person in the DMV database, as permitted by the law of the State. The state DMV official would first need to determine whether the request seeks "personal information" as defined by the DPPA. If so, the state DMV official would then need to ascertain whether the request fits falls within one of the mandatory disclosure provisions of the DPPA. If disclosure is not mandated but might be prohibited, the state DMV official would then be required to determine whether the request falls within one of the DPPA's many permissive exceptions. If the request is not for a purpose permitted by the DPPA, the DPPA would require the state DMV official to refuse the request. Clearly state DMV officials are the ones who must administer the DPPA's commands on a daily basis. State officials would be made the gatekeepers for state information, not because the *States* have decided the information is private, but because *Congress* has so decided. As in *Printz*, "it will be the [state official] and not some federal official who stands between [the requestor and his or her request]. And it will likely be the [state official], not some federal official, who will be blamed for any error . . . ." 117 S.Ct. at 2382.

New York and *Printz* also hold more broadly that Congress must "regulate individuals, not States." *New York*, 505 U.S. at 166.; *Printz*, 117 S.Ct. at 2377. The DPPA does more than violate the Tenth Amendment's prohibition against statutes which require States to

administer federal regulatory programs. It also improperly forces States to regulate.

The DPPA forces States to exercise regulatory power over individuals whenever the States restrict individuals' access to information. This command to the States to regulate is in clear violation of the holdings of *New York* and *Printz*. The States under the DPPA would regulate the public's access to state-held drivers' license information; the fact that the federal regulation is primarily in the form of a command to withhold something rather than to take an affirmative act does not make it any less a regulation.[8] Moreover, since 18 U.S.C. § 2721(b) requires the States to make certain disclosures, as the Eleventh Circuit held in *Pryor v. Reno*, the Government's argument that the DPPA requires no affirmative act by the States is simply not true.

The coerced use of state officials to carry out federal policy choices is precisely what *New York* and *Printz* disapproved. The underlying rationale for both cases is that in order for accountability to occur in this country's dual-sovereignty system of government, the

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[8] Both the Seventh and Tenth Circuits appear to have assigned some importance to the fact that violations of the Act are policed by the federal government rather than by the States. *Oklahoma*, 161 F.3d at 1272 (Act "does not conscript state officials to enforce federal law"); *Travis*, 163 F.3d at 1003 (suggesting that the measure of constitutionality is whether Congress "assign[s] the enforcement duty to federal officials"). Similar enforcement duties were retained by the federal government in the Brady Act, a fact which did not affect the result of *Printz*.

federal government cannot accomplish its purposes while lurking behind state officials. Otherwise, "Members of Congress can take credit for 'solving' problems," while the States are "put in the position of taking the blame for [the federal program's] burdensomeness and its defects." *Printz*, 117 S.Ct. at 2382.

There can thus be no question that the DPPA is unconstitutional under both the language and the rationale of *New York* and *Printz*. The Government ignores both the literal language of those cases and the reasons underlying their results.

2. The Government's primary argument, made largely without reference to the Tenth Amendment, is that the DPPA is as valid a Commerce Clause regulation of the States as, for instance, the Fair Labor Standards Act as analyzed in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). Pet. 13-17. *New York* and *Printz*, however, establish that the Tenth Amendment prohibits statutes which direct States to regulate or to administer federal programs, even though such statutes might otherwise be valid exercises of Commerce Clause power. Once it is established, as it is here, that Congress has violated the Tenth Amendment by issuing direct commands to the States to regulate or administer, the statute is not saved by pointing out a Commerce Clause basis for it.

As in *Printz*, where the statute in question involved "the forced participation of the States' executive in the administration of a federal program," 117 S.Ct. 2376,

there was no need to consider "whether the incidental application of a federal law of general applicability excessively interfered with the functioning of state governments." *Id.* at 2383. Since "the whole *object* of the law [was] to direct the functioning of the state executive," the "balancing" which was done in cases such as *Garcia* is inappropriate. *Id.* (emphasis in original). An act such as the DPPA offends "the very *principle* of separate state sovereignty . . ., and no comparative assessment of the various interests can overcome that fundamental defect." *Id.* (emphasis in original).

The Government's principal argument also fails because the DPPA is in no way a law of general applicability which incidentally applies to the States, as the statutes in *Garcia* and in *South Carolina v. Baker*, 485 U.S. 505 (1988) were characterized by the Court.[9] The first and most obvious reason why is that the Act applies only to States. This is not coincidental, since only States license drivers and vehicles. As in *Printz*, any suggestion that the Act could be extended to private citizens "posits the impossible." 117 S.Ct. at 2383 n.17. Secondly and equally obviously, Congress "has thus far regulated the disclosure of personal information by holders of databases only in piecemeal fashion." *Pryor, supra*, n.7; Pet. App. 16a-17a. The Government attempts to characterize the DPPA as a law of general applicability by cobbling it together with other equally-isolated instances of database

[9] As explained by the Court, *Baker* involved a statute which covered not only state-issued bearer bonds, but also those issued by the United States and private corporations. 485 U.S. at 510.

regulation, but the whole adds up to even less than even the paltry sum of its parts. Congress simply has made no effort to enact generally-applicable database privacy legislation.[10]

The Government can cite no case in which a statute held to be a valid exercise of Commerce Clause power applied to States and to no one else. Only federal statutes of general applicability have been sustained when applied to States as an exercise of Commerce Clause power. In both *New York* and *Printz*, this Court characterized the cases cited or relied upon here by the Government as cases where State governments were subjected to generally applicable laws. *New York*, 505 U.S. at 160; *Printz*, 117 S.Ct. at 2383 ("incidental application to the States of a federal law of general applicability").

The Government thus urges a result in this case which would substantially contract the Tenth Amendment protections previously set in this Court's decisions. This Court has never held, and should not now hold, that Commerce Clause power may be exercised in such a fashion that it can validly affect activities in which only States are engaged.

3. The Government's final argument, Pet. 20-21,

[10] As a demonstration of how far-fetched the Government's argument is, the court of appeals in this case noted that this Court in *Garcia* would not likely have applied the Fair Labor Standards Act to the States if it had previously applied only to video stores, cable providers, and credit bureaus. Pet. App. 19a.

amounts to little more than saying that the alleged merit of a statute justifies its overstepping the bounds of federalism. Similar arguments were rejected in both *New York* and *Printz*:

> Much of the Constitution is concerned with setting forth the form of our government, and the courts have traditionally invalidated measures deviating from that form. The result may appear 'formalistic' in a given case to partisans of the measure at issue, because such measures are typically the product of the era's perceived necessity. But the Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day.

Printz, 117 S.Ct. at 2383, quoting *New York*, 505 U.S. at 187.

But even if the issue of the merit of the statute were relevant, the DPPA is surely one of Congress's least effective efforts at regulation. The Act's exceptions are numerous and its verification requirements nonexistent. The net result is that the Act is capable of manipulation by any unscrupulous person willing to exercise only slight creativity in framing a request which would fall within one of the permitted exceptions.

The breadth of the exceptions to the DPPA is such that the Act did not prevent the sale of entire state drivers' license databases, including photographs, to a private contractor seeking to establish a fraud protection business. *See* n. 7, *supra*. Such sales occurred not only in South Carolina, but also in Florida and Colorado, where the DPPA was in effect at the time of the sales. These sales, later revoked by the Governors of all three States, were permissible under 18 U.S.C. § 2721(c), which allows anyone who receives the database for an authorized use (in this instance, fraud prevention under 18 U.S.C. § 2721(b)(3)) to resell the database to someone else for the same purpose.

4. Finally, the Government argued unsuccessfully in both the district court and the court of appeals that the Act could in any event be sustained as an exercise of Congressional power under Section 5 of the Fourteenth Amendment. The Government makes no reference to the Fourteenth Amendment in its argument in the Petition, and accordingly should be deemed to have abandoned the point. The Government's abandoned argument was without merit in any event, as the court of appeals held. Pet. App. 22a-26a; *accord, Pryor, supra*, 1999 WL 187050 at n.10. However, the question framed in the Petition is so broadly stated as to raise a possibility that the Section 5 issue might still appear in the Government's briefs on the merits should certiorari be granted. In order to avoid the inclusion of this issue not argued in the Petition, Respondent submits that the question should be narrowed as set forth at the beginning of this

Memorandum. in order to make it clear that the Government may attack the judgment below only on Tenth Amendment issues.

CONCLUSION

For the foregoing reasons. Respondents submit that the Petition should be granted, limiting the issue raised by the Government to whether the DPPA violates the Tenth Amendment.

Respectfully submitted.

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April 13, 1999

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No. 98-1464

In the Supreme Court of the United States

OCTOBER TERM, 1998

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, ET AL., PETITIONERS

v.

CHARLIE CONDON, ATTORNEY GENERAL FOR THE STATE OF SOUTH CAROLINA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONERS

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288

In the Supreme Court of the United States

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Respondents agree that the Court should grant certiorari in this case to review the court of appeals' decision holding the Driver's Privacy Protection Act of 1994 (DPPA), 18 U.S.C. 2721-2725, unconstitutional. Resp. Mem. 1-2, 8. Specifically, respondents point out that "[t]he four circuits in which the issue has arisen are evenly split in their results," and they submit that "[c]learly, a decision of this Court is necessary to resolve the present inconsistency in the enforceability of [the DPPA] in different regions of the country." *Id.* at 2.

Respondents urge the Court to rephrase the question presented by the certiorari petition, however, to limit the issue before the Court to whether the DPPA violates the Tenth Amendment, and to exclude consideration of Section 5 of the Fourteenth Amendment as a basis to sustain the validity of the DPPA. Resp. Mem. 15-16. The government does not rely in this Court on Section 5 of the Fourteenth Amendment as a basis for the DPPA, and the certiorari petition does not seek review of the aspect of the court of appeals' decision rejecting the Fourteenth Amendment as a basis for the DPPA (see Pet. App. 22a-26a). Accordingly, it is unnecessary to restate the question presented in the manner suggested by respondents.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

APRIL 1999

Supreme Court, U.S.
FILED
JUN 24 1999
CLERK

No. 98-1464

In the Supreme Court of the United States

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v.

CHARLIE CONDON, ATTORNEY GENERAL FOR THE STATE OF SOUTH CAROLINA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED: MARCH 15, 1999
CERTIORARI GRANTED: MAY 17, 1999

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NOTICE

The following items have been omitted in printing this appendix because they appear on the following pages in the printed appendix to the petition for a writ of certiorari:

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

No. 3:96cv3476

CHARLIE CONDON, PLAINTIFF

SOUTH CAROLINA PRESS ASSOCIATION; VIRGINIA PRESS ASSOCIATION; NORTH CAROLINA PRESS ASSOCIATION; WEST VIRGINIA PRESS ASSOCIATION; MARYLAND/DELAWARE/DISTRICT OF COLUMBIA PRESS ASSOCIATION; NEWSPAPER ASSOCIATION OF AMERICAN; AMERICAN SOCIETY OF NEWSPAPER EDITORS, INTERVENOR-PLAINTIFF

v.

JANET RENO; USA, DEFENDANT

JANET RENO; USA, INTERVENOR-DEFENDANT

DOCKET ENTRIES

DATE	DOCKET NUMBERS	PROCEEDINGS
1996		
Nov. 19	1	COMPLAINT; FILING FEE $ 120.00 RECEIPT # 300 11097 Service due by 3/19/97 for Janet Reno (geva) [Entry date 11/27/96]

DATE	DOCKET NUMBERS	PROCEEDINGS
		* * * * *
Nov. 20	4	AMENDED COMPLAINT (Amended to Change Caption around) by plaintiff Charlie Condon, (Answer due 11/30/96 for Janet Reno) Service due by 3/20/97 for Janet Reno amending [1-1] complaint (geva) [Entry date 11/27/96]
Dec. 6	5	MOTION to intervene by SC Press Association, VA Press Association, NC Press Association, WVA Press Assoc, MD-DE-DC Press Assoc, Newspaper Assoc, American Society of (geva) [Entry date 12/10/96]
		* * * * *
Dec. 10	7	ORDER granting [5-1] motion to intervene by SC Press Association, VA Press Association, NC Press Association, WVA Press Assoc, MD-DE-DC Press Assoc, Newspaper Assoc, American Society of (signed by Judge Dennis W. Shedd) (geva) [Entry date 12/11/96]
		* * * * *

DATE	DOCKET NUMBERS	PROCEEDINGS
1997		
Jan. 17	9	MOTION by defendant Janet Reno to dismiss action with prejudice (geva)
		* * * * *
Mar. 31	22	MOTION by defendant Janet Reno, defendant USA to dismiss complaint-in-intervention (geva)
		* * * * *
Aug. 14	35	MOTION by plaintiff Charlie Condon, intervenor-plaintiff SC Press Assoc, intervenor-plaintiff Virginia Press Assoc, intervenor-plaintiff NC Press Assoc, intervenor-plaintiff West VA Press Assoc, intervenor-plaintiff Maryland/Delaware, intervenor plaintiff Newspaper Assoc, intervenor-plaintiff American Society for summary judgment (geva)
		* * * * *

DATE	DOCKET NUMBERS	PROCEEDINGS
Sept. 11	39	ORDER granting [35-1] motion for summary judgment, denying [22-1] motion to dismiss complaint-in-intervention, denying [9-1] motion to dismiss action with prejudice and that the United States be PERMANENTLY ENJOINED from enforcing the DPPA in the State of South Carolina. All claims not addressed herein is dismissed as moot. (signed by Judge Dennis W. Shedd) (geva)
Sept. 11	40	SUMMARY JUDGMENT for plaintiff Charlie Condon (by the Clerk) (geva)
Sept. 11	—	Case closed (geva)
Sept 16	41	ORDER amending Order entered on 9/11/97 (signed by Judge Dennis W. Shedd) (geva)

DATE	DOCKET NUMBERS	PROCEEDINGS
Nov. 5	42	NOTICE OF APPEAL by defendant Janet Reno, defendant USA Re: [41-1] order, [39-1] order Fee Status: USA (fee not required) Transcript purchase order due on 11/17/97 Appeal record due on 12/5/97 (cham)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 97-2554

CHARLIE CONDON, ET AL.

v.

UNITED STATES, ET AL.

DOCKET ENTRIES

DATE	DOCKET NUMBERS	PROCEEDINGS
1997		
Nov. 12		Civil case docketed. (db)
		* * * * *
1998		
Jan. 21		Brief filed by Appellant Janet Reno, Appellant US. Type of Service: CD Copies of brief: 8 # brf pages: 37. Sufficient [Y/N]?: n - FRAP - the standard of review is not within the argument section . . . [97-2554] Appellee(s) brief due 2/20/98 for State of SC, for Charlie Condon. (rba)

DATE	DOCKET NUMBERS	PROCEEDINGS
		* * * * *
Feb. 3		Appellant(s) brief made sufficient by Appellant Janet Reno, Appellant US [97-2554] (rba)
		* * * * *
Feb. 27		Brief filed by Appellee Charlie Condon, Appellee State of SC. Type of Service: PM Copies: 8 # brf pages: 30. Sufficient [Y/N]: y. .. [97-2554] (rba)
		* * * * *
Mar. 27		Reply brief filed by Appellant Janet Reno, Appellant US. Type of Service: PM Copies of brief: 8 # brf pages: 69. Sufficient [Y/N]: y. .. [97-2554] (rba)
		* * * * *
Jun. 2		Oral argument heard. Courtroom Deputy: JLC, Jr. [97-2554] (jc)
		* * * * *
Sept. 3		Published, authored opinion filed. [97-2554] (db)
Sept. 3		Judgment order filed. Decision: affirmed. (one judge dissenting) [97-2554] (db)

DATE	DOCKET NUMBERS	PROCEEDINGS
		* * * * *
Oct. 16		Petition filed by Appellant Janet Reno, Appellant US for rehearing. Number copies filed: 20 [2864680-1]., for suggestion for rehearing in banc. Number of copies filed: 20 [2864680-2]. [97-2554] (db)
		* * * * *
Dec. 22		COURT ORDER filed denying the motion for rehearing [2864680-1], denying motion for rehearing en banc [2864680-2] Copies to all counsel. [97-2554] (db)
Dec. 30		Mandate issued. [97-2554](mst)
		* * * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

C.A. No. 3:96-3476-19

CHARLIE CONDON, ATTORNEY GENERAL
FOR THE STATE OF SOUTH CAROLINA,
AND STATE OF SOUTH CAROLINA, PLAINTIFFS

v.

JANET RENO, ATTORNEY GENERAL OF
THE UNITED STATES, AND UNITED
STATES OF AMERICA, DEFENDANTS.

AMENDED COMPLAINT

Plaintiffs Charlie Condon, as Attorney General of the State of South Carolina, and the State of South Carolina, allege as follows:

Jurisdiction and Venue

1. This action seeks injunctive and declaratory relief pursuant to 28 U. S. C. §2201(a) and 2202 for purposes of enjoining the enforcement, in whole or in part, and declaring unenforceable, the Driver's Privacy Protection Act of 1994, P.L No. 103-322, §§300001-300003 (18 U.S.C. §§2721-2725), as an unconstitutional federal directive which requires the State of South Carolina, through its state executive officers and legislative process, to administer a federal program which infringes on the State's sovereign right to legislate as determined by its elected representatives and officials,

all in violation of the Tenth Amendment to the United States Constitution.

2. This Court has jurisdiction in this case pursuant to 28 U.S.C. §1331 because all matters in controversy arise under the Constitution and laws of the United States.

3. Venue is proper in this district pursuant to 28 U.S.C. § 1391(e) in that a substantial portion of the events giving rise to the claim would occur in this judicial district.

Parties

4. Plaintiff Charlie Condon is the duly elected Attorney General for the State of South Carolina, and in that capacity is vested with the authority to protect the legal interests of the State of South Carolina and uphold the State Constitution. He brings this action on behalf of the State of South Carolina in his official capacity.

5. Plaintiff State of South Carolina is a sovereign state of the United States of America.

6. Defendant Janet Reno is the Attorney General of the United States and is responsible, by delegation from the President and Congress of the United States, for the enforcement of criminal and civil penalties which the Driver's Privacy Protection Act of 1994 purports to impose.

7. Defendant United States of America is a sovereign constitutional government of those limited enumerated powers specified in, and restrained by, the Constitution of the United States. All references in this Complaint to the "United States" refer to Defendant United States in its sovereign capacity.

General Allegations

8. In 1994, the Congress of the United States enacted the Driver's Privacy Protection Act. Section 300003 of P.L. 103-322 provides that Driver's Privacy Protection Act takes effect three years after the enactment of P.L. 103-322, i.e., on September 13, 1997.

9. The Act directly commands the states, including South Carolina, not to disclose state motor vehicle and driver's license records except as provided by this Federal statute. 18 U.S.C. §2721(a).

10. The Act would permit the Attorney General of the United States to seek a civil penalty of up to $5,000 per day against a state if that state's department of motor vehicles "has a policy or practice of substantial noncompliance" with the Act. 18 U.S.C. §2723(a).

11. The Act would criminalize the obtaining or disclosing of information which the Act has directed the states not to disclose. 18 U.S.C. §2723(a) would make knowing violation of the Act a federal crime punishable by fine.

12. The Act also would subject to a federal civil damage suit any person who discloses information of the classes and types defined in the Act. 18 U.S.C. §2724(a). The remedies which might be awarded in such cases are defined in the Act as actual damages in an amount not less than $2,500, punitive damages if the disclosure was willful or reckless, attorneys' fees, and injunctive relief. 18 U.S.C. §2724 (b).

13. The State of South Carolina currently regulates the release of driver information through the provisions of Section 31 of Part II of Act No. 438 of 1996, and the

State wishes to continue to address the policy aspects of this question as it sees fit.

First Cause of Action

(Declaratory Relief for Violation of the Tenth Amendment to the U.S. Constitution)

14. Plaintiffs reallege Paragraphs 1 through 12 of the Complaint and by this reference incorporate the allegations in those paragraphs as though set forth in full herein.

15. By directing the states to regulate the disclosure of driver and motor vehicle information, the Act exceeds Congress' authority under the United States Constitution and violates the Tenth Amendment.

16. There is an actual controversy between Plaintiffs and Defendants as to whether the Act is constitutional. Plaintiffs contend that it is unconstitutional; upon information and belief, Defendants will contend that it is constitutional and must be enforced.

17. Plaintiffs are entitled to a declaration from this Court that the Act violates the Tenth Amendment to the United States Constitution, and should not be enforced, in whole or in part.

Second Cause of Action

(Declaratory Relief for Violation of the Eleventh Amendment to the U.S. Constitution)

18. Plaintiffs reallege Paragraphs 1 through 16 of the Complaint and by this reference incorporate the allegations in those paragraphs as though set fourth in full herein.

19. The Act provides in part that

> [a] person who knowingly . . . discloses personal information, from a motor vehicle record, for a purpose not permitted under this chapter shall be liable to the individual to whom the information pertains, who may bring a civil action in a United States district court.

18 U.S.C. § 2724(a).

20. The Act further specifies the remedies available in such civil actions as actual damages, "but not less than $2,500," and punitive damages for "willful or reckless violation of the law." 18 U.S.C. §2724(b).

21. Even if the Act is consistent with the Tenth Amendment, which Plaintiffs emphatically deny, the remedy provisions of 18 U.S.C. § 2724 quoted above are in violation of the Eleventh Amendment because they would effectively authorize damage suits against states under Congress's Commerce Clause powers by authorizing suits against the agents and employees of states. The Commerce Clause does not grant Congress the power to abrogate the states' sovereign immunity. Moreover, the State has not waived its Eleventh Amendment immunity in this context.

Third Cause of Action

(Injunctive Relief)

22. Plaintiffs reallege Paragraphs 1 through 20 of this Complaint, and by this reference incorporate the allegations of those paragraphs as though set fourth in full herein.

23. Plaintiffs are entitled to an Order enjoining Defendants from enforcing the Act in whole or in part.

Relief Requested

WHEREFORE, Plaintiffs respectfully pray that this Court grant the following relief.

1. Enter a declaratory judgment that the Act violates the Constitution of the United States and may not be enforced by Defendants against the State of South Carolina.

2. Enter a permanent injunction, enjoining Defendants and their agents and instrumentalities from enforcing the Act in whole or in part.

3. Grant the Plaintiffs such other and further relief as this Court may deem just and proper.

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BY:

/s/ KENNETH P. WOODINGTON
KENNETH P. WOODINGTON
ATTORNEYS FOR PLAINTIFFS

November 20, 1996

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

AFFIDAVIT

Personally appeared before me, J. Glenn Beckham, duly sworn, who deposes and says the following:

1. I am the Deputy Director for the Division of Motor Vehicles, a division of the South Carolina Department of Public Safety. My agency is responsible for the registration of motor vehicles and the issuance of drivers' licenses. I am personally familiar with the issues set forth below which would arise if South Carolina were required to comply with the federal Drivers' Privacy Protection Act (DPPA).

2. The DPPA would impose substantial costs and effort on the South Carolina Division of Motor Vehicles if compliance with the Act is required, as set forth below.

3. In order to comply with the opt-out provisions of 18 U.S.C. §2721(b)(11), it would be necessary as a practical matter for the Division of Motor Vehicles to mail a separate notification for every automobile registered, as well as for every licensed driver. The cost of such a mailing would likely exceed one million dollars.

4. Substantial additional costs would be required to enter the information received in response to such a mailout on the records of the Division. There are almost three million registered vehicles in the State and over twelve million vehicles titled in the State. In addition, there are over 2.3 million licensed drivers in the State. It is therefore reasonable to anticipate that well over a million opt-out requests would be received.

5. The data entry process would include a need to expand each driver's license, motor vehicle registration, and motor vehicle title on the agency's computer system, as well as a need to change the title application form used in the future in order to permit a space for the registrant to opt out of having information disclosed.

6. The implementation of DPPA would also require considerable expense in order to train staff about what information may be released to whom and for what purposes. Since all 70 field offices have access to what DPPA defines as "personal information," and since the penalties for improper release are personal to the employees and are criminal in nature, the training would have to be thorough and detailed.

7. While State law also requires the Division to implement opt-out notifications, State law does not require opt-out notification for drivers' license records, as the DPPA would require.

8. There is accordingly no question that if the DPPA is implemented in South Carolina, the Act's implementation will impose substantial expense and effort on officers and employees of the Division.

/s/ J. GLENN BECKHAM
J. GLENN BECKHAM

SWORN to before me this 21 day of February, 1997.

/s/ JO CAROL MILES (L.S.)
JO CAROL MILES (L.S.)
Notary Public for South Carolina
My Commission Expires: 10-7-2004

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

C.A. 3:96-3476-19

CHARLIE CONDON, ATTORNEY GENERAL FOR THE STATE OF SOUTH CAROLINA; AND STATE OF SOUTH CAROLINA, PLAINTIFFS

and

SOUTH CAROLINA PRESS ASSOCIATION; VIRGINIA PRESS ASSOCIATION; NORTH CAROLINA PRESS ASSOCIATION; WEST VIRGINIA PRESS ASSOCIATION; MARYLAND/DELAWARE/DISTRICT OF COLUMBIA PRESS ASSOCIATION; NEWSPAPER ASSOCIATION OF AMERICA; AND AMERICAN SOCIETY OF NEWSPAPER EDITORS, INTERVENORS

v.

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES; AND UNITED STATES OF AMERICA, DEFENDANTS

[Filed: Sept. 16, 1997]

ORDER

The Court hereby ORDERS on this the 16th day of September, 1997, at Columbia, South Carolina, that the Order entered in this case on September 11, 1997, be AMENDED in the following two respects (the amendments are underlined). First, the first sentence under subsection (1) on page 17 should read:

As noted, the United States primarily relies upon *Whalen*, in which the Supreme Court was presented *with* a constitutional privacy challenge to a State of New York statutory scheme which required the names and addresses of all persons who received prescriptions for certain drugs for which there was both a lawful and an unlawful market *to be disclosed to, and recorded by, the State.*"

Second footnote 21 on page 23 should read:

The Fourth Circuit did not seem overly impressed with these asserted privacy rights. *See* 974 F.2d at 487 ("It is difficult . . . to discern the precise nature of the right that the Red Cross is seeking to protect) and 974 F.2d at 489 ("Whatever privacy interests that are involved are protected by the district court's order").

These amendments are merely technical and do not affect any aspect of the merits of the September 11 Order.

/s/ DENNIS W. SHEDD
DENNIS W. SHEDD
UNITED STATES
DISTRICT JUDGE

In the Supreme Court of the United States

No. 98-1464

JANET RENO, ATTORNEY GENERAL, ET AL.,
PETITIONERS

v.

CHARLIE CONDON, ATTORNEY GENERAL OF
SOUTH CAROLINA, ET AL.

[Filed: May 17, 1999]

ORDER ALLOWING CERTIORARI

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted.

May 17, 1999

Supreme Court, U.S.
FILED
JAN 15 1999
OFFICE OF THE CLERK

No. 98-1464

In the Supreme Court of the United States

JANET RENO, ATTORNEY GENERAL, ET AL.,
PETITIONERS

v.

CHARLIE CONDON, ATTORNEY GENERAL
OF SOUTH CAROLINA, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Whether the Driver's Privacy Protection Act of 1994, 18 U.S.C. 2721-2725 (1994 & Supp. III 1997), contravenes constitutional principles of federalism.

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In the Supreme Court of the United States

No. 98-1464

JANET RENO, ATTORNEY GENERAL, ET AL.,
PETITIONERS

v.

CHARLIE CONDON, ATTORNEY GENERAL
OF SOUTH CAROLINA, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-37a) is reported at 155 F.3d 453. The opinion of the district court (Pet. App. 38a-72a) is reported at 972 F. Supp. 977.

JURISDICTION

The judgment of the court of appeals was entered on September 3, 1998. A petition for rehearing was denied on December 22, 1998. Pet. App. 73a-74a. The petition for a writ of certiorari was filed on March 15, 1999, and was granted on May 17, 1999. J.A. 19. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Commerce Clause of the United States Constitution, Article I, Section 8, Clause 3, provides: "The Congress shall have Power * * * To regulate Commerce * * * among the several States."

2 The Tenth Amendment to the United States Constitution provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

3. The Driver's Privacy Protection Act of 1994, 18 U.S.C. 2721-2725 (1994 & Supp. III 1997), is reprinted in an appendix to this brief (App., *infra*, 1a-7a).

STATEMENT

1. This case presents a constitutional challenge to the Driver's Privacy Protection Act of 1994 (DPPA or Act), 18 U.S.C. 2721-2725 (1994 & Supp. III 1997). The DPPA regulates the disclosure of personal information contained in the records of state motor vehicle departments (DMVs). The Act also regulates the further resale and disclosure of such information by persons to whom it is disclosed by a state DMV.[1]

[1] The DPPA was enacted as part of an omnibus crime control law, the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, Tit. XXX, § 300002, 108 Stat. 2099. The Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee held hearings on the DPPA on February 3 and 4, 1994. Those hearings were never printed, and we are informed by the Clerk of the Judiciary Committee that the Committee no longer has documents or transcripts relating to the DPPA hearings. The principal prepared submissions to the Subcommittee are available on WESTLAW. See *Protecting Driver Privacy: Hearings on H.R. 3365 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 103d Cong., 2d Sess., *available at* 1994 WL 212813, 212822, 212833, 212834, 212835, 212836, 212696, 212698, 212701, 212712, 212720 (Feb. 3-4, 1994).

A resident of a State who wishes to operate a motor vehicle in that State is generally required to obtain a driver's license from his State's DMV. As a condition of obtaining a driver's license, an individual is usually required to provide the DMV with personal information, such as the driver's name, address, telephone number, and in some cases medical information that may bear on the driver's ability to operate a motor vehicle. In some States, the DMV also requires a driver to provide his social security number and takes a photograph of the driver. An individual who wishes to register a motor vehicle is also usually required by the state DMV to provide personal information, including his name and address, and information identifying his vehicle, such as the make, model, and year of manufacture. See, *e.g.*, S.C. Code Ann. §§ 56-1-20 (driver's license required), 56-1-80, 56-1-90 (requirements of license application, identification requirement), 56-1-130 (medical information), 56-3-110 (vehicles required to be licensed and registered), 56-3-220 (certificate of title required), 56-3-240 (requirements of vehicle registration application) (Law. Co-op. 1977 & West Supp. 1998).

State DMVs, in turn, frequently sell this personal information to individuals and businesses.[2] Although

[2] Representative Moran, a sponsor of the DPPA, observed: "Currently, in 34 States across the country anyone can walk into a DMV office with your tag number, pay a small fee, and get your name, address, phone number and other personal information—no questions asked." 140 Cong. Rec. H2522 (daily ed. Apr. 20, 1994); see also 139 Cong. Rec. 29,466 (1993) (statement of Sen. Boxer); *id.* at 29,468 (statement of Sen. Warner); *id.* at 29,469 (statement of

DMVs usually charge only a small fee for each particular sale of information, aggregate revenues are substantial. For example, New York's motor vehicle department earned $17 million in one year from individuals and businesses that used that State's computers to examine motor vehicle records. See 1994 WL 212813 (Feb. 3, 1994) (statement of Janlori Goldman, American Civil Liberties Union). The Wisconsin Department of Transportation receives about $8 million each year from its sale of motor vehicle information. See *Travis* v. *Reno*, 163 F.3d 1000, 1002 (7th Cir. 1998), petition for cert. pending, No. 98-1818.

Testimony before Congress established that the personal information contained in state DMV records has considerable commercial value. In particular, the personal information sold by state DMVs is used extensively to support the direct-marketing efforts of businesses. See 1994 WL 212836 (Feb. 3, 1994) (statement of Richard A. Barton, Direct Marketing Association) ("The names and addresses of vehicle owners, in combination with information about the vehicles they own, are absolutely essential to the marketing efforts of the nation's automotive industry."). Personal information in DMV records "is combined with information from other sources and used to create lists for selective marketing use by businesses, charities, and political candidates." *Ibid.* See also 1994 WL 212834 (Feb. 3, 1994) (statement of Prof. Mary J. Culnan, Georgetown University) (describing commercial uses of personal information in DMV records by

Sen. Robb); 1994 WL 212834 (Feb. 3, 1994) (statement of Prof. Mary J. Culnan, Georgetown University); 1994 WL 212813 (Feb. 3, 1994) (statement of Janlori Goldman, American Civil Liberties Union).

database compilers and direct marketers); 140 Cong. Rec. H2522 (daily ed. Apr. 20, 1994) (statement of Rep. Moran) ("Marketers use DMV lists to do targeted mailings and other types of marketing.").

Congressional testimony highlighted potential threats to privacy and personal safety from disclosure of personal information held in state DMV records. One highly publicized example involved the murder of actress Rebecca Schaeffer, who had taken pains to ensure that her address and phone number were not publicly listed. Despite those precautions, a stalker was able to obtain Schaeffer's home address in her state motor vehicle records. See 140 Cong. Rec. H2522 (daily ed. Apr. 20, 1994) (statement of Rep. Moran). Congress was informed of numerous similar instances in which stalkers, robbers, and assailants had used state motor vehicle records to locate, threaten, and harm their victims.[3]

More generally, Congress received evidence that the commercial use of personal information in state DMV records for purposes wholly unrelated to the regulatory reasons for which the information was initially obtained created serious privacy concerns. Professor Mary Culnan testified that privacy concerns about the use of information "are especially likely to arise when the reuse is not compatible with the original purpose for collecting the information," since in such circumstances "the prospect of misinterpretation or crass exploitation

[3] See 1994 WL 212698 (Feb. 4, 1994) (statement of Rep. Moran); 1994 WL 212822 (Feb. 3, 1994) (statement of David Beatty, National Victim Center); 1994 WL 212833 (Feb. 3, 1994) (statement of Donald L. Cahill, Fraternal Order of Police); 139 Cong. Rec. 29,469 (1993) (statement of Sen. Robb); *id.* at 29,470 (statement of Sen. Harkin).

usually follows." 1994 WL 212834 (Feb. 3, 1994) (citation omitted). Professor Culnan further explained:

> DMV information is not collected voluntarily. Few people can survive without a driver[']s license or an automobile, and a condition of having either is to register with the state. By providing this information to marketers without providing an opt-out to its citizens, the state is essentially requiring people to participate in direct marketing absent any compelling public safety argument. This is in direct contrast to most of the other mailing lists based on private sector data, such as a list of subscribers to a particular magazine. The people on these lists have indicated an interest in participating in direct marketing because they have "raised their hands" in the marketplace by voluntarily responding to a commercial offer of some type. No such claim may be made for all licensed drivers and registered automobile owner[s].

Ibid.

2. Because unregulated dissemination of personal information in state DMV records raised concerns about privacy and personal safety, Congress enacted the DPPA to restrict the disclosure of personal information in motor vehicle records without the consent of the individual to whom the information pertains, and to restrict the resale and redisclosure of such personal information once it has been disclosed by a DMV for a permissible purpose. The overarching theory of the DPPA is that, except in certain circumstances in which Congress has found an important public interest warranting disclosure, the permissibility of dissemination of personal information in state DMV records should turn on the consent of the individual to whom

the information pertains. The DPPA therefore permits disclosure of individuals' personal information only for specific purposes, unless a DMV adopts an alternative procedure to permit drivers to block unrestricted disclosure of their personal information. If a DMV does adopt such an alternative "opt-out" procedure, then it may release more broadly the records of those individuals who do not invoke their right to block unrestricted disclosure.

a. The DPPA generally prohibits any state DMV, or officer or employee thereof, from "knowingly disclos[ing] or otherwise mak[ing] available to any person or entity personal information about any individual obtained by the department in connection with a motor vehicle record." 18 U.S.C. 2721(a). The DPPA defines "personal information" as any information "that identifies an individual, including an individual's photograph, social security number, driver identification number, name, address (but not the 5-digit zip code), telephone number, and medical or disability information," but not including "information on vehicular accidents, driving violations, and driver's status." 18 U.S.C. 2725(3). A "motor vehicle record" is defined as "any record that pertains to a motor vehicle operator's permit, motor vehicle title, motor vehicle registration, or identification card issued by a department of motor vehicles." 18 U.S.C. 2725(1).

As noted above, the DPPA bars only nonconsensual disclosures. Thus, DMVs may release personal information for any use, if they provide individuals with an opportunity to opt out from such general disclosure when they receive or renew their licenses. 18 U.S.C. 2721(b)(11). In addition, a DMV may release personal information if the DMV obtains consent on a case-by-case basis from the individual to whom the information

pertains. 18 U.S.C. 2721(d). A DMV also may disclose information about an individual if the requester has that individual's written consent. 18 U.S.C. 2721(b)(13).

The prohibition on nonconsensual disclosures is not absolute. The Act permits DMVs to disclose personal information from motor vehicle records in circumstances in which Congress found that the public interest in disclosure for a particular use outweighs concerns about invasion of privacy. Accordingly, the DPPA expressly permits DMVs to disclose personal information from motor vehicle records for use "by any government agency," including a court, or by "any private person or entity acting on behalf of a Federal, State, or local agency in carrying out its functions." 18 U.S.C. 2721(b)(1). The Act also allows DMVs to disclose personal information for any state-authorized purpose relating to the operation of a motor vehicle or public safety. 18 U.S.C. 2721(b)(14). Thus, the DPPA expressly accommodates safety and law enforcement needs of public authorities.

The DPPA also authorizes disclosure of personal information to private entities for other specific purposes. The Act allows DMVs to disclose information for use in connection with car safety, prevention of car theft, driver safety, and other motor-vehicle-related matters, 18 U.S.C. 2721(b)(2); for use by a business to verify the accuracy of personal information submitted to that business, and to prevent fraud or to pursue legal remedies if the information the individual submitted to the business is revealed to have been inaccurate, 18 U.S.C. 2721(b)(3); for use in connection with court, agency, or self-regulatory body proceedings, 18 U.S.C. 2721(b)(4); for research purposes, if the personal information is not further disclosed or used to contact the individuals, 18 U.S.C. 2721(b)(5); by insurers in connection with claims investigations, anti-fraud activities, rating, or underwriting, 18 U.S.C. 2721(b)(6); to notify owners of towed or impounded vehicles, 18 U.S.C. 2721(b)(7); by licensed private investigative agencies or security services for permitted purposes, 18 U.S.C. 2721(b)(8); for use by employers to verify information relating to a holder of a commercial driver's license, 18 U.S.C. 2721(b)(9) (1994 & Supp. III 1997); and for use in connection with private tollways, 18 U.S.C. 2721(b)(10).

In addition, personal information in motor vehicle records may be disclosed in certain circumstances for bulk distribution for surveys, marketing, or solicitation, but only if individuals are provided an opportunity, in a clear and conspicuous manner, to block such use of information pertaining to them. 18 U.S.C. 2721(b)(12). Thus, disclosure of motor vehicle information about an individual for direct-marketing purposes is prohibited unless (a) the individual is provided the opportunity, under Section 2721(b)(11), to block general disclosure of his personal information, and declines that opportunity, or (b) the individual is given the opportunity to block use of his personal information for direct marketing specifically, and declines that opportunity.[4]

b. The DPPA also regulates the resale and redisclosure of motor vehicle information by private persons who have obtained that information from a DMV. See 18 U.S.C. 2721(c) (1994 & Supp. III 1997). The DPPA's restrictions on resale and redisclosure by private

[4] The DPPA also provides that personal information in motor vehicle records "shall be disclosed" for certain specific purposes pursuant to other federal statutes. 18 U.S.C. 2721(b) (1994 & Supp. III 1997). As we explain below (pp. 28-29 n.12, *infra*), that provision does not impose any new disclosure requirements, but rather makes clear that the DPPA does not bar disclosures otherwise required by federal law.

persons turn in large part on whether the DMV from which the information was obtained has adopted opt-out procedures under Section 2721(b)(11) to permit individuals to object to general disclosure of their personal information. If the DMV has not adopted such opt-out procedures, then a private person who obtained the information for one of the permissible purposes specified in Section 2721(b)(1)-(10) may further disclose DMV information only for one of those purposes; he may not further disclose information either for direct-marketing purposes, or more generally. See 18 U.S.C. 2721(c) (first sentence) (1994 & Supp. III 1997). If the DMV has adopted opt-out procedures to permit individuals to object to general disclosure, then an authorized recipient who has obtained motor vehicle information pursuant to a policy of general disclosure may disclose the information for any purpose. See *ibid.* (second sentence). In addition, a recipient who has obtained motor vehicle information specifically for direct-marketing purposes may resell that information for other direct-marketing uses, but not otherwise. See *ibid.* (third sentence) (permitting redisclosure "pursuant to" 18 U.S.C. 2721(b)(12)); 18 U.S.C. 2721(b)(12)(B) (permitting disclosure for direct marketing only if "the information will be used, rented, or sold solely for bulk distribution for surveys, marketing, and solicitations"). Finally, any person who receives personal information from a DMV and resells or further discloses that information must, for five years, maintain records identifying each person or entity to whom a further resale or redisclosure was made, and the permitted purpose for such resale or redisclosure. See 18 U.S.C. 2721(c) (fourth sentence) (1994 & Supp. III 1997).

c. The DPPA makes it unlawful for any "person" knowingly to obtain or disclose any record for a use not permitted by the Act, 18 U.S.C. 2722(a), or to make a false representation in order to obtain personal information from a motor vehicle record, 18 U.S.C. 2722(b). "Person" is defined to exclude any State or state agency. See 18 U.S.C. 2725(2). The Act also sets forth penalties and civil remedies for knowing violations. Any "person" who knowingly violates the DPPA may be subject to a criminal fine. 18 U.S.C. 2723(a), 2725(2). A state agency that maintains "a policy or practice of substantial noncompliance" with the DPPA may be subject to a civil penalty imposed by the Attorney General of not more than $5000 per day for each day of substantial noncompliance. 18 U.S.C. 2723(b). Any "person" who knowingly obtains, discloses, or uses information from a state motor vehicle record for a use not permitted by the DPPA may be subject to liability in a civil action brought by the person to whom the information pertains. 18 U.S.C. 2724. The responsibility for enforcement of the Act's criminal and civil penalty provisions lies entirely with the Attorney General of the United States. The DPPA does not impose on the States any obligation to pursue legal remedies against any requester who obtains, uses, or discloses information in violation of the Act, or any employee who wrongfully discloses information.

3. South Carolina law provides that the Motor Vehicle Division of the State's Department of Public Safety will release information contained in its motor vehicle records to anyone, provided that the requester fills out a form listing his name and address and stating that the information will not be used for telephone solicitation. S.C. Code Ann. §§ 56-3-510 to 56-3-540 (West Supp. 1998). The Department of Public Safety is authorized

to charge a fee for the release of requested information. *Id.* § 56-3-530 (West Supp. 1998).

Respondents, the Attorney General of South Carolina and the State of South Carolina, brought this action in federal district court, alleging that the DPPA violates the Tenth Amendment, and seeking an injunction against enforcement of the DPPA. J.A. 9-14. The district court granted summary judgment for respondents and entered a permanent injunction against the Act's enforcement. Pet. App. 38a-40a. The district court ruled that this case is controlled by *New York* v. *United States*, 505 U.S. 144 (1992), and *Printz* v. *United States*, 521 U.S. 898 (1997). The court stated that the DPPA has the same defect as the statutes invalidated in *New York* and *Printz* because, "[i]n enacting the DPPA, Congress has chosen not to assume responsibility directly for the dissemination and use of these motor vehicle records. Instead, Congress has commanded the States to implement federal policy by requiring them to regulate the dissemination and use of these records." Pet. App. 53a.

4. a. A divided panel of the court of appeals affirmed. Pet. App. 1a-37a. The court expressed no doubt that the DPPA regulates "commerce" within the scope of Congress's Commerce Clause power. The court observed, however, that Congress "is constrained in the exercise of that [commerce] power by the Tenth Amendment. Thus, the question * * * is not whether the DPPA regulates commerce, but whether it is consistent with the system of dual sovereignty established by the Constitution." *Id.* at 8a.

The court acknowledged that "the DPPA is different in several respects from the statutes struck down in *New York* and *Printz*." Pet. App. 14a. "Unlike the federal statute in *New York*, the DPPA does not commandeer the state legislative process. In particular, the DPPA does not require the States to enact legislation regulating the disclosure of personal information contained in their motor vehicle records." *Ibid.* Further, "unlike the federal statute in *Printz*, the DPPA does not conscript state officers to enforce the regulations established by Congress. Indeed, the DPPA does not require that state officials report or arrest violators of the DPPA." *Ibid.*

The court nonetheless reasoned that state officials must "administer" the DPPA, and that the Act is unconstitutional for that reason. Pet. App. 14a. In the court's view, *New York* and *Printz* made "perfectly clear that the Federal Government may not require State officials to administer a federal regulatory program." *Ibid.* The court rejected the government's contention that "the holdings in *Printz* and *New York* apply only when the [federal] law in question requires a State to regulate the behavior of its citizens," and do not condemn a statute that, like the DPPA, "simply regulates a state activity." *Id.* at 15a.

The court also found the DPPA unconstitutional even on the assumption that the federal government's understanding of *New York* and *Printz* is correct. The majority rejected the argument that the DPPA should be sustained under cases such as *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), and *South Carolina* v. *Baker*, 485 U.S. 505 (1988), which upheld federal regulation of state activities affecting commerce. The majority believed that *Garcia* established a broad limit on Congress's power to regulate state activity: "Under *Garcia* and its progeny, Congress may only 'subject state governments to generally applicable laws.'" Pet. App. 15a (quoting *New York*, 505 U.S. at 160). In the court's view, *Garcia*

and its progeny do not govern this case because the DPPA's restrictions apply only to state agencies:

> [T]he DPPA exclusively regulates the disclosure of information contained in state motor vehicle records. Of course, there is no private counterpart to a state Department of Motor Vehicles. Private parties simply do not issue drivers' licenses or prohibit the use of unregistered motor vehicles. Thus, rather than enacting a law of general applicability that incidentally applies to the States, Congress enacted a law that, for all intents and purposes, applies *only* to the States.

Pet. App. 17a.

The court recognized that, in other federal statutes, Congress has restricted the disclosure of personal information by private parties, and that the DPPA thus subjects the States to the same kind of regulation that governs private parties. Pet. App. 18a. The court dismissed that point as irrelevant, however, because Congress had not regulated information disclosure by private and state entities in a single, general statute:

> Under *Garcia*, a statute is constitutional only if it *is* generally applicable. A law is not generally applicable simply because it *could be* generally applicable. That Congress could subject private parties to the same type of regulation is irrelevant to the Tenth Amendment. Congress may invade the sovereignty of the States only when it actually enacts a law of general applicability. Nothing short of that will pass constitutional muster.

Ibid.

b. Judge Phillips dissented. Pet. App. 27a-37a. He concluded that the DPPA is valid Commerce Clause

legislation that does not contravene any Tenth Amendment limitation on congressional power. Judge Phillips stressed that "the end object of the Act is the direct regulation of state conduct," not "the indirect regulation of private conduct" accomplished "by forcing the states directly to regulate that conduct." *Id.* at 29a. He concluded that the Act's "direct regulation of the State activity * * * distinguishes the DPPA, in the most fundamental of ways, from the federal legislation struck down respectively in *New York* and *Printz*." *Id.* at 30a.

Judge Phillips also contested the majority's view that *Garcia* limited Congress to regulating state activity only through laws of general applicability. Pet. App. 31a-32a. Although Judge Phillips noted that the statutes upheld in *Garcia* and *EEOC* v. *Wyoming*, 460 U.S. 226 (1983), imposed duties on both state and private actors, he explained that those laws were upheld "not so much—if at all—because they applied equally to state and private actors as because they directly regulated state activities rather than using the 'States as implements of regulation' of third parties." Pet. App. 32a (quoting *New York*, 505 U.S. at 161). Judge Phillips also urged that "[s]urely it is no basis for invalidating such regulations that no private equivalent could be found in the particular area of regulation." *Id.* at 37a. To the contrary, he concluded, "[t]o assume that Congress could only regulate the states' conduct directly if it also equally regulated comparable private conduct (even where none in fact exists)" bears "no relationship to any concept of federalism implicit in the Tenth Amendment as interpreted by the Supreme Court." *Id.* at 34a.

c. The panel denied the government's petition for rehearing, and the full court denied the government's

suggestion of rehearing en banc by a vote of seven to six. Pet. App. 73a-74a.[5]

SUMMARY OF ARGUMENT

A. In an age of advancing information technology, the threat to privacy from the nonconsensual dissemination of personal information has become a matter of increasing public concern and regulatory attention. Congress has thus far addressed privacy concerns arising out of the nonconsensual disclosure of personal information in statutes that regulate particular sectors of the private economy, such as video stores, cable television companies, financial institutions, credit bureaus, and electronic communications services. In addition, other federal statutes restrict the circumstances in which the federal government may disclose personal information about private citizens that federal agencies gather in the course of their official duties. In each of those focused statutes, Congress has prohibited many kinds of disclosures but has permitted personal information to be released in circumstances where it has found an important countervailing interest warranting disclosure or access.

The Driver's Privacy Protection Act of 1994 (DPPA or Act), 18 U.S.C. 2721-2725 (1994 & Supp. III 1997), extends this balanced regulatory approach to restrict certain nonconsensual disclosures of personal informa-

[5] Since the panel's decision was issued, panels of the Seventh and Tenth Circuits have upheld the DPPA against similar Tenth Amendment challenges, while an Eleventh Circuit panel has held that the DPPA contravenes the Tenth Amendment. See *Travis* v. *Reno*, 163 F.3d 1000 (7th Cir. 1998), petition for cert. pending, No. 98-1818; *Oklahoma* v. *United States*, 161 F.3d 1266 (10th Cir. 1998), petition for cert. pending, No. 98-1760; *Pryor* v. *Reno*, 171 F.3d 1281 (11th Cir. 1999), petition for cert. pending, No. 99-61.

tion held by state motor vehicle departments. Congress addressed disclosure of personal information held in state DMV records after receiving evidence of threats to personal privacy and safety resulting from unrestricted disclosure. Evidence before Congress established that the States earn substantial revenues from sales of personal information in DMV records, and that such personal information is central to the direct-marketing operations of commercial enterprises. Personal information obtained from state DMV files is therefore subject to federal regulation under Congress's Commerce Clause power because such information is itself in interstate commerce, and because disclosure of such information substantially affects interstate commerce.

B. This Court's decisions articulating the constitutional principles of federalism reflected in the Tenth Amendment interpose no obstacle to the DPPA. In *New York* v. *United States*, 505 U.S. 144 (1992), and *Printz* v. *United States*, 521 U.S. 898 (1997), the Court explained that, although Congress may directly regulate state activity in or affecting commerce, it may not commandeer a State's legislative process by requiring it to adopt legislation to implement a federal regulatory scheme, and it may not conscript state officials in the application of federal law to private parties. The DPPA, however, does not have either of these defects. The DPPA does not direct the States to adopt legislation or regulations, nor does it require state officers to enforce its provisions against dissemination by private persons. Enforcement of the law against violators is the responsibility of the Attorney General of the United States. The States' obligation is simply to comply with the Act's prohibition against disclosure of personal information from DMV records. A con-

gressional prohibition against state action does not commandeer state officers or entities into regulating or enforcing federal law.

Such an obligation to *comply* with the substantive terms of a federal statute is not equivalent to a duty to *implement* a federal regulatory scheme. Even if a duty to comply with the substantive requirements of a federal regulatory statute has the effect of causing a State to modify its internal administrative procedures, that does not transform substantive federal regulation into impermissible commandeering of the State's executive branch. As the Court made clear in *South Carolina* v. *Baker*, 485 U.S. 505 (1988), Congress may, consistent with the Tenth Amendment, require States to comply with federal law, even if the States find it necessary or practically useful to revise their administrative practices or legislation in response to the federal legislation.

The DPPA, moreover, is respectful of state regulatory prerogatives. It does not interfere with the States' ability to license and regulate driving within their borders, or to collect information from individuals who apply for driver's licenses and motor vehicle registration. Thus, the DPPA does not interfere with the States' ability to regulate their citizens' primary conduct.

C. The DPPA is not constitutionally infirm because it applies only to state entities, and is not a "generally applicable" law. No constitutional rule requires Congress to regulate state activity in or affecting commerce only through statutes that also regulate similar private activity. Congress may exercise its Commerce Clause power to address problems as they make themselves manifest, and it is not required to legislate for the entire economy as a precondition to regulating

state activity that presents an immediately pressing concern warranting federal attention.

A rule requiring a generally applicable law as a precondition to federal regulation of state activity in or affecting commerce would be inconsistent with the plenary grants to Congress of the power to regulate interstate commerce by making "all Laws," not merely generally applicable ones, that are necessary and proper for doing so. U.S. Const. Art. I, § 8, Cls. 3 and 18. Those Clauses confirm that Congress retains the flexibility ordinarily possessed by legislative bodies to tailor their laws to the problems at hand and to choose between laws of general or more particular applicability. The need for that flexibility is particularly evident here, for Congress reasonably could decide not to address in a single act all privacy concerns raised across the economy by dissemination of personal information from a wide variety of private and public databases.

The rigid rule adopted by the court of appeals also finds no support in the constitutional structure of federalism insofar as it protects the sovereign powers of the States. The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." If particular state activity affecting commerce may be brought within the reach of a regulatory law of the United States when it *is* generally applicable, then the power to address that particular state activity necessarily *does* lie within the powers "delegated to the United States" by the Constitution. Nothing in the Tenth Amendment divests Congress of that power if it seeks to act through a law directed only to the state activity. Nor does the absolute rule adopted by the

court of appeals bear any relation to whether a federal law impermissibly intrudes on the exercise of the sovereign powers of the States, or to the diffusion of power and protection of liberty that the constitutional structure of federalism was designed to secure.

ARGUMENT

THE DRIVER'S PRIVACY PROTECTION ACT OF 1994 IS CONSISTENT WITH CONSTITUTIONAL PRINCIPLES OF FEDERALISM

A. Personal Information Held In State Motor Vehicle Records Is Subject To Congress's Commerce Clause Power

In several sectors, Congress has identified concerns arising out of the dissemination of, and commerce in, personal information without the consent of the individual to whom the information pertains, and has acted to restrict and regulate such disclosure and commerce. In the context of personal information in the records of private enterprises, Congress has enacted statutes that restrict nonconsensual disclosures of personal information by credit bureaus, educational institutions, banks, cable television companies, electronic communications services, video stores, and, in some circumstances, employers.[6] Congress has also restricted the disclosure of personal information held by the

[6] See Fair Credit Reporting Act, 15 U.S.C. 1681b (1994 & Supp. III 1997); Family Educational Rights and Privacy Act of 1974, 20 U.S.C. 1232g(b); Right to Financial Privacy Act of 1978, 12 U.S.C. 3401-3422; Cable Communications Policy Act of 1984, 47 U.S.C. 551; Electronic Communications Privacy Act of 1986, 18 U.S.C. 2702; Video Privacy Protection Act of 1988, 18 U.S.C. 2710; Employee Polygraph Protection Act of 1988, 29 U.S.C. 2008; Americans with Disabilities Act of 1990, 42 U.S.C. 12112(d)(3); see also pp. 40-41, *infra*.

federal government.[7] In these statutes, Congress has balanced individuals' privacy interests with countervailing public interests in disclosure by prohibiting certain forms of disclosure of personal information and permitting others. Each of these statutes accommodates those considerations differently.

The Driver's Privacy Protection Act of 1994 (DPPA or Act), 18 U.S.C. 2721-2725 (1994 & Supp. III 1997), added another panel to this quilt of federal privacy protections by regulating the dissemination of personal information originally collected from individuals by state motor vehicle agencies.[8] The DPPA authorizes disclosure for certain purposes, and prohibits disclosure for others; it also permits disclosure for any purpose if individuals are afforded the opportunity to opt out from such general disclosure. These rules regulate disclosure as an initial matter by a state DMV, and also govern private persons' resale of personal information obtained from a DMV. See pp. 6-11, *supra*.

There can be no doubt that the subject matter of the DPPA, the disclosure of and commerce in personal information held by state DMVs, is a proper object of regulation under Congress's Commerce Clause powers. (Indeed, the court of appeals did not suggest otherwise,

[7] See Privacy Act of 1974, 5 U.S.C. 552a (1994 & Supp. III 1997); 26 U.S.C. 6103 (1994 & Supp. III 1997) (confidentiality of tax returns); 13 U.S.C. 9 (1994 & Supp. III 1997) (confidentiality of census data).

[8] The DPPA's provisions for allowing individuals to provide consent to disclosure of their personal information were taken directly from the Video Privacy Protection Act of 1988. See 1994 WL 212698 (Feb. 4, 1994) (Rep. Moran); see also 1994 WL 212834 (Feb. 3, 1994) (Prof. Mary J. Culnan, Georgetown University) (noting that approach used in Video Privacy Protection Act "has become the model" for direct marketing).

and respondents did not allege or argue below that the subject of the DPPA, dissemination of personal information held in state DMV records, is beyond the reach of Congress's Commerce Clause power.[9]) The activity licensed by state DMVs and in connection with which individuals must submit personal information to the DMV—the operation of motor vehicles—is itself integrally related to interstate commerce. Further, Congress learned that state DMVs frequently sell the personal information held in their records, and that States collect substantial sums from such sales. See pp. 3-4, *supra*. The record before Congress also established that personal information obtained from DMVs is central to the direct-marketing efforts of many companies, as well as to database compilers.[10] And the

[9] See Pet. App. 8a ("Thus, the question before this Court is not whether the DPPA regulates commerce, but whether it is consistent with the system of dual sovereignty established by the Constitution."). Respondents' complaint raised only Tenth and Eleventh Amendment challenges to the DPPA; it did not challenge the DPPA on the ground that personal information in DMV records is not subject to Congress's regulatory power under the Commerce Clause. See J.A. 9, 12-13. In their court of appeals brief, respondents cited the Commerce Clause case of *United States* v. *Lopez*, 514 U.S. 549 (1995), only once and in a footnote, where they stated obliquely that it was "doubtful" that the DPPA is a valid exercise of Congress's Commerce Clause power. See Resp. C.A. Br. 8 n.3; see also Pls.' Mem. in Opp. to Mot. to Dismiss 10 n.4 (similar footnote).

[10] See, *e.g.*, 1994 WL 212836 (Feb. 3, 1994) (Richard A. Barton, Direct Marketing Association) ("The names and addresses of vehicle owners, in combination with information about the vehicles they own, are absolutely essential to the marketing efforts of the nation's automotive industry."); 1994 WL 212834 (Feb. 3, 1994) (Prof. Mary J. Culnan, Georgetown University) (explaining how motor vehicle information is used by commercial database compilers, direct-marketing companies, and fundraisers to develop targeted mailing lists).

DPPA regulates the resale and redisclosure of personal information from DMV records once it has passed into private hands, as well as the initial disclosure from a state DMV. Such personal information is therefore legitimately subject to congressional regulation because the States place the private information into commerce, and because dissemination of the information is an activity "having a substantial relation to interstate commerce." See *United States* v. *Lopez*, 514 U.S. 549, 558-559 (1995); see also *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 538 (1985); *EEOC* v. *Wyoming*, 460 U.S. 226, 235-236 (1983); *FERC* v. *Mississippi*, 456 U.S. 742, 753-758 (1982); *id.* at 775 (O'Connor, J., concurring in the judgment in part and dissenting in part).

Without questioning that the dissemination of personal information in state DMV records falls within Congress's power to regulate commerce, the court of appeals ruled the DPPA is nonetheless unconstitutional, for two reasons. First, although the court acknowledged (Pet. App. 14a) that the DPPA neither "commandeer[s] the state legislative process" nor "conscript[s] state officers to enforce the regulations established by Congress," it concluded (*id.* at 14a-15a) that the DPPA requires state agencies to "administer" the Act. Therefore, it held, the DPPA contravenes "our system of 'dual sovereignty,'" as explicated in this Court's decisions in *New York* v. *United States*, 505 U.S. 144 (1992), and *Printz* v. *United States*, 521 U.S. 898 (1997).

Second, the court rejected the contention that the DPPA is constitutional under cases such as *Garcia*,

supra, which sustained the application of federal statutes regulating commercial activity to state entities. The court concluded that, unlike the federal statutes upheld in cases like *Garcia*, the DPPA is not a law "generally applicable" to both private and state activity. Further, the court regarded as irrelevant the fact that the DPPA is similar to other federal legislation that regulates disclosure of personal information by private enterprises. "Under *Garcia*," the court held (Pet. App. 18a), "a statute is constitutional only if it *is* generally applicable. * * * That Congress could subject private parties to the same type of regulation is irrelevant to the Tenth Amendment. Congress may invade the sovereignty of the States only when it actually enacts a law of general applicability. Nothing short of that will pass constitutional muster." As we now explain, both reasons given by the court of appeals for invalidating the DPPA are without substance.[11]

[11] It is not entirely clear whether the court of appeals considered the fact that the DPPA is not "generally applicable" to be an independent ground for the DPPA's asserted unconstitutionality, or rather a reason why, in its view, cases like *Garcia* did not answer the constitutional concerns raised by the fact that the DPPA supposedly requires state entities to "administer" the Act. As we explain below (pp. 34-47, *infra*), the fact that the DPPA may not be "generally applicable" is in any event not determinative of the constitutionality of the DPPA. Although this Court has held that, if a federal statute *is* generally applicable to state and private activity in or affecting commerce, that fact is sufficient to overcome arguments that the statute impermissibly commandeers the States into participating in the enforcement of federal law, the Court has never held that a federal statute *must* be generally applicable to be constitutional.

B. The DPPA Does Not Commandeer Or Conscript States Into Applying Federal Law; Rather, It Requires State Entities To Comply With Substantive Federal Regulation, And Prohibits Contrary State Practices

1. In *New York* v. *United States*, the Court sustained a constitutional challenge to provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985, 42 U.S.C. 2021b *et seq.* (1988), that required the States either to regulate the disposal of certain radioactive waste generated within their borders, or to take title to such waste. See 505 U.S. at 169-170, 174-177. The Court framed the constitutional question before it as whether "Congress may use the States as implements of regulation; that is, whether Congress may direct or otherwise motivate the States to regulate in a particular field or in a particular way." *Id.* at 161. Emphasizing that, "even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts," *id.* at 166, the Court held that "[t]he Federal Government may not compel the States to enact or administer a federal regulatory program," *id.* at 188. The Court concluded that the challenged provisions were inconsistent with "the Constitution's division of authority between federal and state governments," *id.* at 175, because they "commandeer[ed] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program," *id.* at 176 (citation omitted).

In *Printz* v. *United States*, the Court found a similar constitutional flaw in a provision of the Brady Handgun Violence Prevention Act, 18 U.S.C. 922(s) (1994), that required local chief law enforcement officers to make a

reasonable effort to determine whether a proposed transfer of a handgun would violate the law. The Court found it "apparent that the Brady Act purports to direct state law enforcement officers to participate * * * in the administration of a federally enacted regulatory scheme." 521 U.S. at 904. The Court reemphasized that Congress "cannot compel the States to enact or enforce a federal regulatory program," and held also that Congress "cannot circumvent that prohibition by conscripting the States' officers directly" in the administration of federal law. *Id.* at 935. The Brady Act's "conscript[ion]" of local law enforcement officials also violated the Constitution's division of authority between federal and state governments, the Court held, because "[t]he Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program." *Ibid.* See also *Alden* v. *Maine*, No. 98-436 (June 23, 1999), slip op. 3-4 (States are "not relegated to the role of mere provinces or political corporations" of the national government).

The court of appeals in this case recognized that the DPPA does *not* present the constitutional flaw present in either *New York* or *Printz*:

> Unlike the federal statute in *New York*, the DPPA does not commandeer the state legislative process. In particular, the DPPA does not require the States to enact legislation regulating the disclosure of personal information contained in their motor vehicle records. Instead, Congress enacted the regulations limiting the dissemination of information from those records. Moreover, unlike the federal statute in *Printz*, the DPPA does not conscript state officers

> to enforce the regulations established by Congress. Indeed, the DPPA does not require that state officials report or arrest violators of the DPPA. Instead, the DPPA is enforced through civil penalties imposed by the United States Attorney General against the States and permits criminal fines and civil causes of action against individuals.

Pet. App. 14a.

The court of appeals' conclusion that the DPPA does not conscript state governments into federal service is plainly correct. Unlike the statutes examined in *New York* and *Printz*, the DPPA does not require state governments or officers to regulate the primary activities of private parties or to participate in the enforcement of federal law against private actors. The DPPA therefore does not "conscript state governments" as "agents" of federal regulatory power. See *New York*, 505 U.S. at 178; see also *FERC*, 456 U.S. at 792 (O'Connor, J., concurring in part and dissenting in part) ("the Framers concluded that government by one sovereign through the agency of a second cannot be satisfactory"). Rather, the DPPA directly regulates the dissemination of personal information in state DMV files, and requires DMVs to comply with that substantive regulation. Moreover, unlike the statute invalidated in *Printz*, see 521 U.S. at 904-905, the DPPA's restrictions on disclosure do not operate as means to effectuate private parties' compliance with federal law. Nor did Congress obligate the States to enforce the DPPA's proscriptions against violators. Enforcement of the DPPA's substantive restrictions on dissemination against violators is the responsibility of federal officials. The DPPA therefore does not effect "the indirect regulation of private conduct" through a

state apparatus, Pet. App. 29a (Phillips, J., dissenting), and does not "impress the state executive into [federal] service," *Printz*, 521 U.S. at 907.

Our point that the DPPA does not conscript state governments into federal service is underscored by the fact that the DPPA's disclosure restrictions impose no affirmative obligations on the States to implement federal law; rather, they impose substantive prohibitions on state activity. In *Printz* and *New York*, in which this Court found federal statutes to contravene the Constitution's structure of federalism, Congress had required active state participation in the enforcement of federal law against private parties. See also *Alden*, slip op. 40 (Congress may not "commandeer the entire political machinery of the State against its will"). The DPPA's disclosure restrictions, however, require no active state participation. Instead, they simply forbid DMVs from taking action (dissemination of information) that contravenes the substantive restrictions on disclosure put in place by the federal law to protect personal privacy.[12]

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[12] The DPPA also provides that personal information from motor vehicle records "shall" be disclosed to carry out the purposes of other federal statutes, including the Anti Car Theft Act of 1992, Pub. L. No. 102-519, 106 Stat. 3384; the Automobile Information Disclosure Act, 15 U.S.C. 1231 *et seq.*; the Clean Air Act, 42 U.S.C. 7401 *et seq.*; and certain provisions in Title 49 relating to motor vehicle safety and regulation, 49 U.S.C. 30101-30169, 30501-30505, 32101-33118 (1994 & Supp. III 1997). See 18 U.S.C. 2721(b) (1994 & Supp. III 1997). That provision, however, does not impose any new reporting requirements on the States. Rather, it makes plain that the DPPA does not qualify any obligation to disclose motor vehicle information that might exist under other provisions of federal law. Respondents have not challenged this aspect of the DPPA or any other reporting requirements, and any such reporting requirements could not in any event provide a basis for a

The distinction between laws that impose affirmative obligations on States and those that prevent States from taking action is well reflected in this Court's preemption jurisprudence. Although *New York* and *Printz* hold that Congress may not *require* the States to pass legislation or participate in the execution of a federal regulatory program, it is well established that Congress may *prohibit* the States from regulating in a particular field, as long as regulation of the field lies within reach of Congress's enumerated powers.[13] Such federal prohibitions against state action have an extensive pedigree: federal law has often said to the States, "Don't do any of these things." See *FERC*, 456 U.S. at 793 n.30 (O'Connor, J., concurring in part and dissenting in part) (quoting Henry M. Hart, Jr., *The*

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challenge to the DPPA's *restrictions* on information disclosure. Further, as the Court recognized in *Printz*, reporting requirements imposed on state entities do not involve the same issues as those raised by "the forced participation of the States' executive in the actual administration of a federal program." 521 U.S. at 918; see *id.* at 936 (O'Connor, J., concurring) ("the Court appropriately refrains from deciding whether other purely ministerial reporting requirements imposed by Congress on state and local authorities pursuant to its Commerce Clause powers are similarly invalid").

[13] The latter principle derives directly from the Supremacy Clause of the Constitution, Art. VI, Cl. 2, and this Court's preemption precedents. See *Printz*, 521 U.S. at 913 (noting that, under the Supremacy Clause, "all state officials" have a duty "to enact, enforce, and interpret state law in such fashion as not to obstruct the operation of federal law," and "the attendant reality" is that "all state actions constituting such obstruction, even legislative acts, are *ipso facto* invalid"); *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 290 (1981) ("[I]t is clear that the Commerce Clause empowers Congress to prohibit all—and not just inconsistent—state regulation of such activities [*i.e.*, private activity affecting commerce]."); see also *New York*, 505 U.S. at 167; *FERC*, 456 U.S. at 764.

Relations Between State and Federal Law, 54 Colum. L. Rev. 489, 515 (1954)). Thus, even in the context (unlike here) in which the anti-commandeering rule *does* apply—where the federal government attempts to dictate how the States regulate private conduct—the Constitution permits federal laws that prohibit the States from regulating that conduct at all, in order to prevent interference with federal interests and protections afforded by federal law. Similarly here, the anti-commandeering rule of *New York* and *Printz* does not cloud Congress's authority to prevent the States from taking action in a field of legitimate federal concern.

2. Even though the court of appeals recognized that the DPPA does not have the same defect as the statutes at issue in *New York* and *Printz*, it nonetheless concluded that state officials must "administer" the DPPA, and that the Act runs afoul of the Constitution for that reason. The panel's conception of the manner in which state officials must "administer" the DPPA is not entirely clear, but it appears to have believed that the DPPA is unconstitutional because state officials must, as a practical matter, take affirmative steps to comply with the details of the substantive dictates of the DPPA's disclosure prohibitions. That conclusion, however, is directly contrary to this Court's decision in *South Carolina* v. *Baker*, 485 U.S. 505 (1988).

In *South Carolina* v. *Baker*, the Court rejected a Tenth Amendment challenge to a federal statute that, in effect, prohibited States from issuing bearer bonds, and required that state debt instruments be issued in the form of registered bonds. See 485 U.S. at 511. The law was challenged on the ground that it allegedly "commandeer[ed] the state legislative and administrative process by coercing States into enacting legislation

authorizing bond registration and into administering the registration scheme." *Id.* at 513. The Court found no such defect in the challenged statute, however, because the law "regulate[d] state activities; it [did] not * * * seek to control or influence the manner in which States regulate private parties." *Id.* at 514. Further, in turning aside the argument that the challenged provision was unconstitutional because "state officials had to devote substantial effort to determine how best to implement a registered bond system," the Court explained:

> Such "commandeering" is, however, an inevitable consequence of regulating a state activity. Any federal regulation demands compliance. That a State wishing to engage in certain activity must take administrative and sometimes legislative action to comply with federal standards regulating that activity is a commonplace that presents no constitutional defect.

Id. at 514-515; see also *FERC*, 456 U.S. at 762 (observing that Court has "upheld federal statutory structures that in effect directed state decisionmakers to take or to refrain from taking certain actions").

To be sure, a state DMV may find it appropriate to institute procedures to ensure that it complies with the requirements of the DPPA. For example, a state agency may determine that it should train its employees so that they are aware of the limitations on permissible disclosure under the Act, and that they can make informed judgments as to whether a request for disclosure is covered by Act's provisions for permissible disclosure. Such training, however, would not itself be required by federal law; it would merely be an incidental effect of a requirement to comply with a

federal prohibition on disclosure, which does not itself involve any commandeering of state governments.

Moreover, in many situations in which a federal statute permissibly regulates state activity, a state agency may find it appropriate to institute procedures and train its employees to ensure compliance with the federal law. The Fair Labor Standards Act of 1938 (FLSA), for example, imposes maximum hours on employment by state agencies, and requires state agencies either to pay overtime pay or to provide compensatory time off for work in excess of those maximum hours. See 29 U.S.C. 207(a) and (*o*) (1994 & Supp. III 1997). The maximum-hours provisions of the FLSA, however, do not apply to "any employee employed in a bona fide executive, administrative, or professional capacity." 29 U.S.C. 213(a)(1). Thus, a state entity subject to the FLSA will have to make judgments as to whether particular employees are employed in executive, administrative, or professional capacities, including making responses to individual employees' requests for overtime pay or compensatory time off. Cf. *Auer* v. *Robbins*, 519 U.S. 452 (1997) (examining whether public-sector employees were professional employees under FLSA). For those employees who are covered by the FLSA, state entities may need to institute procedures to ensure that such employees receive either overtime pay or compensatory time off when they are required to work overtime. The incidental burden of making such decisions and ensuring such compliance, however, has never been held to constitute a Tenth Amendment violation.

3. In *Garcia*, this Court abandoned the effort, begun in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), to expound "affirmative limits on the Commerce Clause power in terms of core governmental functions

and fundamental attributes of state sovereignty." 469 U.S. at 556; see *id.* at 547-548. It bears note, however, that the DPPA is particularly respectful of state prerogatives. The DPPA does not prevent state and local governments from using the information contained in DMV records for governmental purposes. To the contrary, the Act expressly permits DMVs to disclose personal information in their records for use "by any government agency, including any court or law enforcement agency, in carrying out its functions, or any private person or entity acting on behalf of a Federal, State, or local agency in carrying out its functions." 18 U.S.C. 2721(b)(1). The Act also permits disclosure for use "in connection with any civil, criminal, administrative, or arbitral proceeding in any Federal, State, or local court or agency." 18 U.S.C. 2721(b)(4). And it permits disclosure of information for any use "related to the operation of a motor vehicle or public safety." 18 U.S.C. 2721(b)(14).

The DPPA therefore does not inhibit the States' authority to license drivers, register vehicles, or remove dangerous drivers and vehicles from the roads. Nor does it restrict the authority of state DMVs to *collect* information from persons wishing to be licensed to drive or to register their motor vehicles. In sum, the DPPA does not impede the States' authority or ability to regulate the primary conduct of their citizens. Accordingly, nothing in the DPPA contravenes the proposition that "our federalism requires that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation." *Alden*, slip op. 39.[14]

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[14] Indeed, the Seventh Circuit observed in *Travis* v. *Reno*, 163 F.3d 1000, 1003 (1998), petition for cert. pending, No. 98-1818, that

C. The DPPA Permissibly Regulates State Activity Even If It Does Not Regulate Similar Private Activity

1. The court of appeals also held that the restrictions on information disclosure imposed by the DPPA could not be validly applied to state DMVs because the DPPA is not a "generally applicable" law. Pet. App. 18a. This Court has, of course, upheld the application of numerous federal statutes to state activity where those statutes also applied to similar private activity. Contrary to the court of appeals' view, however, no constitutional principle of federalism imposes a rule that state activities in or affecting commerce, and hence otherwise within the scope of Congress's power, may be subject to federal regulation *only* if Congress also imposes identical or closely similar regulation on similar activities of private enterprises in the same statute.[15]

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the DPPA would pass constitutional muster even under the analysis that was applied under *National League of Cities*, before that decision was overruled by *Garcia*. Under *National League of Cities*, federal regulation of state activity was impermissible only if it "directly impair[ed]" the State's ability to "structure integral operations in areas of traditional governmental functions." See *EEOC* v. *Wyoming*, 460 U.S. at 239; *South Carolina* v. *Baker*, 485 U.S. at 529 (Rehnquist, C.J., concurring in the judgment). Because the DPPA accommodates the needs of state and local government in using the information held in DMV files, it cannot be said to "portend[] * * * [a] wide-ranging and profound threat to the structure of state governance." *EEOC* v. *Wyoming*, 460 U.S. at 240. In fact, the district court observed that respondents had offered "no specific interest (other than historical) to justify its need to allow its motor vehicle records to be publicly disseminated" on an unqualified basis. Pet. App. 67a.

[15] Although the DPPA is constitutional even if it is not a "generally applicable" law, it is questionable whether the court of appeals correctly concluded that the DPPA is not generally applicable. It is true that the DPPA does not regulate the dissemination of personal information such as names, addresses, and social security numbers across the economy from wherever such information may be stored (be it in private or public files). The DPPA does generally apply, however, to regulate the sale and disclosure of personal information originally collected by state DMVs, even after that information has been disseminated to private persons. As we have explained, if a state DMV does not adopt an alternative, opt-out procedure under Section 2721(b)(11) to permit individuals to object to unrestricted disclosure of their personal information, then the DMV may disclose information only for particular purposes, and anyone—even a private entity—who receives the information for such purposes may resell or redisclose it only for similar, specified permissible purposes. See pp. 9-10, *supra*. The DPPA's civil remedy and criminal fine provisions, moreover, would apply to a private person who made a redisclosure that was not authorized by the Act.

Rather, this Court's decisions establish that, although Congress may not commandeer the States in the implementation of a federal regulatory program by requiring them to enact legislation (as in *New York*) or by conscripting state officials to participate in the enforcement of federal law against, or application of federal law to, third parties (as in *Printz*), Congress may directly regulate state activity in or affecting commerce. That is so whether or not it *also* regulates similar private activity. Because the state activity in this case is unquestionably subject to Congress's Commerce Clause power (see pp. 21-23, *supra*), the DPPA is constitutional.

In several cases in which this Court rejected Tenth Amendment challenges to the application of federal regulatory statutes to state entities, the Court observed that such application merely brought state activities within the reach of a law that was also applicable to private entities. See *EEOC* v. *Wyoming*, 460 U.S. at 233; *United Transp. Union* v. *Long Island R.R.*,

455 U.S. 678, 686- 690 (1982); *Fry* v. *United States*, 421 U.S. 542, 548 (1975); *Maryland* v. *Wirtz*, 392 U.S. 183, 196-199 (1968).[16] This Court did not, however, uphold the application of those statutes merely because as a formal matter they applied to the activities of private enterprises as well as state entities. Rather, a federal statute that applies equally (or similarly) to private and state activities in or affecting commerce is inherently a regulatory act of the federal government only, and does not commandeer or conscript state governments in their own regulatory role. As Judge Phillips observed in dissent below, those statutes were held "immune to Tenth Amendment challenge not so much—if at all—because they applied equally to state and private actors as because they directly regulated state activities rather than using the States as implements of regulation of third parties." Pet. App. 32a (internal quotation marks omitted).

Thus, in *New York* v. *United States*, the Court distinguished cases such as *Garcia*, "in which Congress has subjected a State to the same legislation applicable to private parties," 505 U.S. at 160, from the litigation before it, which "concern[ed] the circumstances under which Congress may use the States as implements of regulation; that is, whether Congress may direct or otherwise motivate the States to regulate in a particular field or a particular way," *id.* at 161. Although that distinction is an important one, the court of appeals erred in extrapolating from it the principle that "Congress may *only* 'subject state governments to generally applicable laws.'" Pet. App. 15a (emphasis

[16] *Maryland* v. *Wirtz* was overruled by *National League of Cities*, 426 U.S. at 853-855, but *National League of Cities* was in turn overruled by *Garcia*, 469 U.S. at 557.

added).[17] This Court's reasoning supports no such rigid constitutional rule. Rather, when this Court in *New York* distinguished federal regulatory requirements, with which state entities must comply, from requirements that state entities exercise their own power to regulate private persons, it recognized that statutes of general applicability do not contravene the anti-commandeering principle because generally applicable laws, by their nature, do not require the States to participate in the regulation of private persons. The Court did not suggest that all other statutes applicable to state entities run afoul of the Tenth Amendment, whether or not they violate the proscription against commandeering. In fact, the Court's decision in *New York* echoed its decision in *South Carolina* v. *Baker*, where it sustained the federal restriction against bearer bonds and observed that the challenged law "regulate[d] state activities [and did not] seek to control or influence the manner in which States regulate private parties," and thus did not present "a commandeering of state regulatory machinery." 485 U.S. at 514.

The DPPA, therefore, is not constitutionally infirm on the ground that it regulates only information held in state DMV records and not also similar information held in private databases. As was true of the statute upheld in *South Carolina* v. *Baker*, the DPPA "regulates state activities"; it does not "seek to control or influence the manner in which States regulate private parties." 485 U.S. at 514. The DPPA regulates how

[17] As the Seventh Circuit noted in *Travis*, 163 F.3d at 1006, the word "only" in the court of appeals' opinion quoted in the text "comes from the [F]ourth [C]ircuit rather than the Supreme Court."

state DMVs may disseminate their own data; it does not require the States to impose any restrictions on private dissemination or to pursue any remedies or to assure compliance by taking action against or with respect to anyone outside state government. Further, the DPPA applies to private persons' redisclosure of information from state DMV records as well as the initial disclosure by the state DMV. And the federal government, not the States, is responsible for prosecuting violators. See p. 11, *supra*.

The court of appeals' rule is also difficult to square with this Court's preemption jurisprudence. Congressional preemption of state regulatory authority, by definition, applies only to the States, since there is no analogous private regulation. Yet, as we have explained (see pp. 29-30, *supra*), federal preemption of state law has long been understood to present no constitutional difficulty, and preemption certainly has never been thought constitutionally problematic merely because it applies only to the States.[18] To the contrary, federal preemption is constitutional even though "such congressional enactments obviously curtail or prohibit the States' prerogatives to make legislative choices respecting subjects the States may consider impor-

[18] This point is perhaps most clearly demonstrated by federal statutes, such as the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705, that prohibit state regulation of a commercial area but do not replace it with federal regulation covering the same area. See 49 U.S.C. 41713(b)(1) (preempting state law related to any price, route, or service of an air carrier); *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374 (1992). Such express preemption of state regulatory authority cannot be meaningfully described as a generally applicable law, and yet under this Court's preemption jurisprudence, it is unquestionably constitutional.

tant." *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 290 (1981).[19]

2. Not only is the rule articulated by the panel majority without support in this Court's precedents; it also is inconsistent with the structure of the Constitution, which vests in Congress the power to fashion laws in the manner it believes most appropriate to respond to the problems affecting commerce—and which imposes no obligation on Congress to act only through laws of general applicability when it seeks to respond to such problems resulting from the activities of the States.

a. This Court has consistently recognized that a legislature is not required to "strike at all evils at the same time," *Semler* v. *Oregon State Bd. of Dental Exam'rs*, 294 U.S. 608, 610 (1935), and that "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *Williamson* v. *Lee Optical, Inc.*, 348 U.S. 483, 489 (1955). That point has been markedly true in the privacy area, for Congress has perceived that privacy concerns raised by the dissemination of personal information do not readily lend themselves to regulation that must, like Procrustes' bed, fit all. Congress has thus far proceeded cautiously in regulating disclosure of personal information, and has addressed

[19] Similarly, this Court has held that Congress may direct the States to "op[en] [the] doors" of their quasi-adjudicative machinery to claimants seeking reliance on federal law in a field that Congress could have preempted, and to apply substantive federal law in disputes before their administrative agencies, even though such a directive by definition applies only to the States, and not to private parties. See *FERC*, 456 U.S. at 760-761.

privacy issues on a sector-by-sector basis.[20] Rather than adopting across-the-board privacy regulations for all databases in or affecting commerce, Congress has enacted privacy protections targeted at problems arising in specific commercial fields.[21] Each of these pro-

[20] That "sectoral" approach strongly influenced Congress's decision, when it enacted the Privacy Act of 1974, 5 U.S.C. 552a (1994 & Supp. III 1997), not to regulate personal information in the private sector at that time, but rather to confine the Privacy Act's reach to information held by the federal government, and to establish a Privacy Protection Study Commission to address broader privacy issues concerning personal information. See S. Rep. No. 1183, 93d Cong., 2d Sess. 19-20, 23-24 (1974). The Commission's study, in turn, took a sectoral approach to privacy questions, separately addressing (for example) privacy issues in insurance, employment, and medical care contexts. See U.S. Privacy Protection Study Comm'n, *Personal Privacy in an Information Society* 155-317 (1977). The sectoral tradition of privacy regulation in the United States is well recognized by commentators, including those who favor more comprehensive regulation. See, *e.g.*, Colin J. Bennett, *Regulating Privacy: Data Protection and Public Policy in Europe and the United States* 114 (1992); David H. Flaherty, *Protecting Privacy in Surveillance Societies* 306 (1989); Joel R. Reideberg, *Setting Standards for Fair Information Practice in the U.S. Private Sector*, 80 Iowa L. Rev. 497, 500-501, 508 (1995); *The EC Privacy Directive and the Future of U.S. Business in Europe: A Panel Discussion*, 80 Iowa L. Rev. 669, 670 (1995) (comments of Marc Rotenberg).

[21] The Fair Credit Reporting Act, Pub. L. No. 91-508, Tit. VI, § 601, 84 Stat. 1129, restricts the circumstances in which credit agencies may disseminate consumer credit reports, see 15 U.S.C. 1681b (1994 & Supp. III 1997). The Family Educational Rights and Privacy Act of 1974, Pub. L. No. 93-380, Tit. V, § 513, 88 Stat. 571, restricts the release of education records, without the consent of a student's parents and except under specific circumstances, from educational institutions receiving federal financial assistance, see 20 U.S.C. 1232g(b). The Right to Financial Privacy Act of 1978, Pub. L. No. 95-630, Tit. XI, 92 Stat. 3697, restricts the

visions is quite involved, for each attempts to accommodate both privacy concerns and countervailing interests in disclosure. Also, each responds to different privacy concerns; problems raised by unrestricted disclosure of personal financial information to government authorities are manifestly not the same as those raised by unrestricted dissemination of the results of medical examinations or polygraph tests. The DPPA is in line with this "long-standing tradition" of "address[ing] privacy issues affecting the private sector on a sectoral basis." 1994 WL 212834 (Feb. 3, 1994) (Prof. Mary J. Culnan, Georgetown University).[22]

circumstances under which financial institutions may disclose information to government authorities, see 12 U.S.C. 3401-3422. The Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 2(c), 98 Stat. 2794, restricts the circumstances in which a cable television provider may disclose information about subscribers, see 47 U.S.C. 551(c). The Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848, restricts disclosure of stored electronic communications, see 18 U.S.C. 2511(3). The Video Privacy Protection Act of 1988, Pub. L. No. 100-618, 102 Stat. 3195, restricts the disclosure of video tape rental and sale records, see 18 U.S.C. 2710. The Employee Polygraph Protection Act of 1988, Pub. L. No. 100-347, § 9, 102 Stat. 652, restricts disclosure of the results of polygraph tests administered to employees, see 29 U.S.C. 2008. And the Americans with Disabilities Act of 1990, Pub. L. No. 101-336, Tit. I, § 102, 104 Stat. 331, restricts the disclosure of the results of medical examinations administered to applicants for employment, see 42 U.S.C. 12112(d)(3).

[22] Indeed, when Congress enacted the DPPA, it paid particular attention to differences between motor vehicle records and other public records containing similar information, which it decided not to regulate. One concern that motivated enactment of the DPPA was that personal information in motor vehicle records, including names and addresses, is keyed to license plate numbers, which drivers must display to the general public. "Unlike with license

Congress should be free to respond to privacy (and other) concerns as they become apparent, without being restricted by an artificial constraint requiring legislation affecting States to be "generally applicable," in the sense suggested by the court of appeals. A constitutional rule precluding Congress from regulating state activity in or affecting commerce unless and until it enacts a law covering similar private activity would deprive Congress of the much-needed ability to experiment in addressing regulatory concerns in complex fields such as this one, and could have highly undesirable results. As the Seventh Circuit observed, such a restriction on Congress's authority to regulate the field of information disclosure would hardly be salutary: "A statute covering all databases would rival the Internal Revenue Code for complexity without offering states any real defense from the cost and inconvenience of regulation. * * * Brobdignagian legislation is not the Constitution's objective, even when consolidation is feasible." *Travis* v. *Reno*, 163 F.3d 1000, 1006 (1998),

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plate numbers, people concerned about privacy can usually take reasonable steps to withhold their names and address[es] from strangers, and thus limit their access to personally identifiable information" in other records. 140 Cong. Rec. H2523 (daily ed. Apr. 20, 1994) (statement of Rep. Edwards); *ibid.* (statement of Rep. Moran). Further, even if individuals' names and addresses can be searched in other public records, such as voter registration records and land records, that information is not necessarily so readily accessible as information in motor vehicle records. Indeed, "[t]here was no evidence before the subcommittee that other public records are vulnerable to abuse in the same way that DMV records have been abused." *Ibid.* (Rep. Edwards). That is not to say that abuses of other kinds of public records could never occur, but Congress is not required to anticipate every potential or speculative abuse in advance as a condition to addressing already well-documented abuses.

petition for cert. pending, No. 98-1818; cf. *Nixon* v. *Administrator of Gen. Servs.*, 433 U.S. 425, 471 (1977) (Constitution does not put Congress "to the choice of legislating for the universe * * * or not legislating at all").

Under the constitutional rule adopted by the court of appeals—requiring Congress to address privacy concerns in all private and public records in a single statute—the result would be legislation that was unmanageably complex (if Congress perceived a need to accommodate countervailing interests in disclosure individually for each type of database), or excessively rigid (if it decided that all databases should be governed by a uniform rule, which would have to be either the least or the most restrictive rule appropriate to any database in the economy), or framed at an extraordinarily high level of generality, requiring extensive administrative development of its application to particular sectors (which would undermine the "general applicability" of the law).[23] Or, the result might be no legislation protecting privacy at all.

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[23] The European Union has adopted a Directive on the privacy of personal data that applies to all sectors of the economy. See Council Directive 95/46/EC on the Protection of Individuals With Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (L 281) 31. The EU Directive, however, sets forth general minimum standards for the protection of personal data, and requires member countries to address the details of implementation in national law. See *id.* art. 5 ("Member States shall, within the limits of the provisions of this Chapter, determine more precisely the conditions under which the processing of personal data is lawful."). Moreover, the approach taken by the EU Directive—an instruction to member states to enact statutes or regulations in conformity with the Directive, see *id.* arts. 1(1), 32—is precisely the approach that Congress cannot

The Constitution should not be read to preclude Congress from addressing regulatory concerns within the scope of its enumerated powers that arise only, or first, or most especially, from activity undertaken by state entities. Indeed, in some situations, Congress may perceive a need to regulate state activity that simply has no private analogue. For example, the federal government may issue security and safety directives to govern the operation of the nation's major airports. The validity of such directives would not turn on whether state and local governments happened to control all of those airports. Similarly, Congress unquestionably has the constitutional authority to prohibit state and local officials from questioning or prosecuting foreign nationals and diplomats. Such restrictions could not be unconstitutional merely because, by their nature, they could apply only to officers of state and local governments.

The Constitution grants Congress the power "To make *all* Laws which shall be necessary and proper for carrying into Execution" its enumerated powers, Art. I, § 8, Cl. 18 (emphasis added), including, of course, the power to regulate commerce, *id.* Cl. 3. Nothing in those plenary grants of power suggests that Congress may only enact *some* laws—those of general applicability—when it acts in matters affecting the States, or that only laws of general applicability are "proper" in that setting. To the contrary, the breadth of the Clause confirms that it vests in Congress the inherent discretion normally possessed by legislative bodies to adapt their laws to the problems they confront, including the flexibility to choose between laws of general and particular applicability.

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adopt under this country's system of dual sovereignty, as explicated in *New York* v. *United States*.

b. In addition to conflicting with the affirmative grants of powers to Congress in Article I of the Constitution, the rigid rule adopted by the court of appeals finds no support in the constitutional structure of federalism insofar as this structure protects the sovereign powers of the States. The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." If particular state activity in or affecting commerce may, consistent with the Constitution, be brought within the reach of a regulatory law of the United States when that law *is* generally applicable, then the power to address that particular state activity necessarily *does* lie within the powers "delegated to the United States by the Constitution." Nothing in the text of the Tenth Amendment suggests that Congress is automatically divested of that power if it seeks to act through a law directed only to that state activity rather than through a law of broader applicability.

Nor do the principles of federalism underlying the Tenth Amendment support the rule announced by the court of appeals. As this Court explained in *Printz*, after adoption of the Constitution, the States "retained 'a residuary and inviolable sovereignty.'" 521 U.S. at 919 (quoting *The Federalist* No. 39, at 245 (James Madison) (Clinton Rossiter ed., 1961)). It is well established, however, that that principle preserves in Congress the power to "legislate[] in matters affecting the States." *Alden*, slip op. 49. The question here, then, is whether the particular legislation that respondents challenge—the DPPA—impermissibly interferes with the "residuary and inviolable sover-

eignty" of the States. The answer to that question turns on an assessment of the law as it affects the powers of the States themselves. It is irrelevant to that inquiry whether private parties are *also* subject to the same legislation.[24] Accordingly, if (as the court of appeals appeared to acknowledge) the protections of personal privacy provided for in the DPPA would not impermissibly intrude upon the exercise of the sovereign powers of the States if those protections were contained in a law that also applied to private parties, then they do not do so in a law that applies only to the States.

As the Court further explained in *Printz*, the Framers' experience under the Articles of Confederation persuaded them to reject a constitutional structure under which Congress would "us[e] the States as instruments of federal governance." 521 U.S. at 919. Instead, the Framers separated the powers of the United States and the States. "The separation of the two spheres is one of the Constitution's structural protections of liberty." *Id.* at 921. "'In the compound republic of America, the power surrendered by the

[24] Thus, as the Seventh Circuit observed in *Travis*, 163 F.3d at 1004, if a State operated a video rental store, it would be subject to the restrictions on disclosure of personal information in the Video Privacy Protection Act of 1988, 18 U.S.C. 2710, and the application of that statute (which happens to be "generally applicable") to the State's activity would present no Tenth Amendment difficulty. But if the federal regulation of the state activity of renting videos would present no constitutional difficulty when effected pursuant to a generally applicable law, it is difficult to see why the same regulation of the same activity would be constitutionally questionable if framed in a statute addressed specifically to state commercial activity, and similar private activity were addressed in a separate statute.

people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.'" *Id.* at 922 (quoting *The Federalist* No. 51, *supra*, at 323 (James Madison)). A constitutional absolute requiring that a federal statute that applies to state activity also address private conduct bears no relation to those important values of diffusion of power and protection of personal liberty. That is especially so here, where Congress perceived a distinct threat to personal privacy resulting from state activities integrally related to commerce, and acted within its sphere of power to afford "security * * * to the rights of the people" by preventing the States from releasing personal information that they require individuals to submit as a condition of engaging in activity—owning and operating a motor vehicle—that is integrally related to commerce generally and also to personal autonomy and economic well-being.

3. It is thus irrelevant to the Constitution that Congress decided to address the particular threats to privacy raised by dissemination of and commerce in information held in state motor vehicle records in a single, focused statute, rather than in a statute addressing analogous issues in other databases, private and public, as well. Rather, federal regulation of state activity in or affecting commerce does not disturb the "balance between the supremacy of federal law and the separate sovereignty of the States" (*Alden*, slip op. 48) if that regulation does not coerce the States into performing as instruments of federal governance. The DPPA does not conscript the States in the enforcement

or execution of federal law. Accordingly, the DPPA is constitutional.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

The Driver's Privacy Protection Act of 1994, 18 U.S.C. 2721-2725 (1994 & Supp. III 1997), provides:

§ 2721. Prohibition on release and use of certain personal information from State motor vehicle records

(a) IN GENERAL.—Except as provided in subsection (b), a State department of motor vehicles, and any officer, employee, or contractor, thereof, shall not knowingly disclose or otherwise make available to any person or entity personal information about any individual obtained by the department in connection with a motor vehicle record.

(b) PERMISSIBLE USES.—Personal information referred to in subsection (a) shall be disclosed for use in connection with matters of motor vehicle or driver safety and theft, motor vehicle emissions, motor vehicle product alterations, recalls, or advisories, performance monitoring of motor vehicles and dealers by motor vehicle manufacturers, and removal of non-owner records from the original owner records of motor vehicle manufacturers to carry out the purposes of titles I and IV of the Anti Car Theft Act of 1992, the Automobile Information Disclosure Act (15 U.S.C. 1231 et seq.), the Clean Air Act (42 U.S.C. 7401 et seq.), and chapters 301, 305, and 321-331 of title 49, and may be disclosed as follows:

(1) For use by any government agency, including any court or law enforcement agency, in carrying out its functions, or any private person or entity acting on behalf of a Federal, State, or local agency in carrying out its functions.

(2) For use in connection with matters of motor vehicle or driver safety and theft; motor vehicle emissions; motor vehicle product alterations, recalls, or advisories; performance monitoring of motor vehicles, motor vehicle parts and dealers; motor vehicle market research activities, including survey research; and removal of non-owner records from the original owner records of motor vehicle manufacturers.

(3) For use in the normal course of business by a legitimate business or its agents, employees, or contractors, but only—

(A) to verify the accuracy of personal information submitted by the individual to the business or its agents, employees, or contractors; and

(B) if such information as so submitted is not correct or is no longer correct, to obtain the correct information, but only for the purposes of preventing fraud by, pursuing legal remedies against, or recovering on a debt or security interest against, the individual.

(4) For use in connection with any civil, criminal, administrative, or arbitral proceeding in any Federal, State, or local court or agency or before any self-regulatory body, including the service of process, investigation in anticipation of litigation, and the execution or enforcement of judgments and orders, or pursuant to an order of a Federal, State, or local court.

(5) For use in research activities, and for use in producing statistical reports, so long as the personal

information is not published, redisclosed, or used to contact individuals.

(6) For use by any insurer or insurance support organization, or by a self-insured entity, or its agents, employees, or contractors, in connection with claims investigation activities, antifraud activities, rating or underwriting.

(7) For use in providing notice to the owners of towed or impounded vehicles.

(8) For use by any licensed private investigative agency or licensed security service for any purpose permitted under this subsection.

(9) For use by an employer or its agent or insurer to obtain or verify information relating to a holder of a commercial driver's license that is required under chapter 313 of title 49.

(10) For use in connection with the operation of private toll transportation facilities.

(11) For any other use in response to requests for individual motor vehicle records if the motor vehicle department has provided in a clear and conspicuous manner on forms for issuance or renewal of operator's permits, titles, registrations, or identification cards, notice that personal information collected by the department may be disclosed to any business or person, and has provided in a clear and conspicuous manner on such forms an opportunity to prohibit such disclosures.

(12) For bulk distribution for surveys, marketing or solicitations if the motor vehicle department has

implemented methods and procedures to ensure that—

(A) individuals are provided an opportunity, in a clear and conspicuous manner, to prohibit such uses; and

(B) the information will be used, rented, or sold solely for bulk distribution for surveys, marketing, and solicitations, and that surveys, marketing, and solicitations will not be directed at those individuals who have requested in a timely fashion that they not be directed at them.

(13) For use by any requester, if the requester demonstrates it has obtained the written consent of the individual to whom the information pertains.

(14) For any other use specifically authorized under the law of the State that holds the record, if such use is related to the operation of a motor vehicle or public safety.

(c) RESALE OR REDISCLOSURE.—An authorized recipient of personal information (except a recipient under subsection (b)(11) or (12)) may resell or redisclose the information only for a use permitted under subsection (b) (but not for uses under subsection (b) (11) or (12)). An authorized recipient under subsection (b)(11) may resell or redisclose personal information for any purpose. An authorized recipient under subsection (b)(12) may resell or redisclose personal information pursuant to subsection (b)(12). Any authorized recipient (except a recipient under subsection (b) (11)) that resells or rediscloses personal information covered by this chapter must keep for a period of 5 years records identifying each person or entity that receives information and the permitted purpose for which the

information will be used and must make such records available to the motor vehicle department upon request.

(d) WAIVER PROCEDURES.—A State motor vehicle department may establish and carry out procedures under which the department or its agents, upon receiving a request for personal information that does not fall within one of the exceptions in subsection (b), may mail a copy of the request to the individual about whom the information was requested, informing such individual of the request, together with a statement to the effect that the information will not be released unless the individual waives such individual's right to privacy under this section.

§ 2722. Additional unlawful acts

(a) PROCUREMENT FOR UNLAWFUL PURPOSE.—It shall be unlawful for any person knowingly to obtain or disclose personal information, from a motor vehicle record, for any use not permitted under section 2721(b) of this title.

(b) FALSE REPRESENTATION.—It shall be unlawful for any person to make false representation to obtain any personal information from an individual's motor vehicle record.

§ 2723. Penalties

(a) CRIMINAL FINE.—A person who knowingly violates this chapter shall be fined under this title.

(b) VIOLATIONS BY STATE DEPARTMENT OF MOTOR VEHICLES.—Any State department of motor vehicles that has a policy or practice of substantial noncompliance with this chapter shall be subject to a

civil penalty imposed by the Attorney General of not more than $5,000 a day for each day of substantial noncompliance.

§ 2724. Civil action

(a) CAUSE OF ACTION.—A person who knowingly obtains, discloses or uses personal information, from a motor vehicle record, for a purpose not permitted under this chapter shall be liable to the individual to whom the information pertains, who may bring a civil action in a United States district court.

(b) REMEDIES.—The court may award—

(1) actual damages, but not less than liquidated damages in the amount of $2,500;

(2) punitive damages upon proof of willful or reckless disregard of the law;

(3) reasonable attorneys' fees and other litigation costs reasonably incurred; and

(4) such other preliminary and equitable relief as the court determines to be appropriate.

§ 2725. Definitions

In this chapter—

(1) "motor vehicle record" means any record that pertains to a motor vehicle operator's permit, motor vehicle title, motor vehicle registration, or identification card issued by a department of motor vehicles;

(2) "person" means an individual, organization or entity, but does not include a State or agency thereof; and

(3) "personal information" means information that identifies an individual, including an individual's photograph, social security number, driver identification number, name, address (but not the 5-digit zip code), telephone number, and medical or disability information, but does not include information on vehicular accidents, driving violations, and driver's status.

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No. 98-1464

In the Supreme Court of the United States

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, ET AL., PETITIONERS,

v.

CHARLIE CONDON, ATTORNEY GENERAL FOR THE STATE OF SOUTH CAROLINA, ET AL., RESPONDENTS.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Whether the Driver's Privacy Protection Act of 1994, 18 U.S.C. §§ 2721-2725, violates the constitutional principles of dual sovereignty reflected in the Tenth Amendment.

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STATEMENT

1. Procedural History.

In this action, the State of South Carolina and its Attorney General challenged the constitutionality of the Driver's Privacy Protection Act of 1994 (DPPA), 18 U.S.C. §§ 2721 - 2725 (1994 & Supp. III 1997). The DPPA had been enacted in 1994 by the 103rd Congress, but its effective date was postponed for three years, until September 1997. Pub. L. No. 103-322, Tit. XXX, § 300003, 108 Stat. at 2102.

The district court held that the Act violated the Tenth Amendment, and enjoined its application shortly before it was scheduled to take effect in September 1997. Pet. App. 38a-56a, 72a. The district court further held that the DPPA could not be sustained as a valid exercise of Congress's power under Section 5 of the Fourteenth Amendment. Pet. App. 56a-72a. The court of appeals affirmed on both grounds. Pet. App. 1a-26a.[1] The United States petitioned for certiorari, and on May 17, 1999, the writ was granted.

In its Reply Memorandum at the certiorari stage of this case, the Government explicitly abandoned its Fourteenth Amendment argument, stating that it "does not rely in this Court on Section 5 of the Fourteenth

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[1] The four circuits in which the issue has arisen are evenly split. In the present case and *Pryor v. Reno*, 171 F.3d 1281 (11th Cir. 1999), petition for cert. pending, No. 99-61, the DPPA was held unconstitutional. The opposite result was reached in *Travis v. Reno*, 163 F.3d 1000 (7th Cir. 1998), petition for cert. pending, No. 98-1818 and in *Oklahoma v. United States*, 161 F.3d 1266 (10th Cir. 1998), petition for cert. pending, No. 98-1760.

Amendment as a basis for the DPPA, and the certiorari petition does not seek review of the court of appeals' decision rejecting the Fourteenth Amendment as a basis for the DPPA." Reply Memorandum for the Petitioners at 2.

2. State Licensing of Drivers and Motor Vehicles.

The first automobiles had scarcely begun to sputter down the nation's unpaved roads when it was recognized that public safety required the registration and licensing of motor vehicles. Likewise, it was immediately recognized that the new vehicles could and would be used for interstate travel.[2]

Even though the interstate nature of automobile travel was apparent from the outset, the States undertook the task of registering motor vehicles at an early date, following a brief initial flurry of municipal or county registration ordinances.[3] New York's 1901 statute was the first statewide motor vehicle registration act. 1901 N.Y. Laws 1313, 1315. By 1906, over 30 of the then-45 States, including South Carolina, had enacted legislation requiring

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[2] For instance, as early as 1901, entrepreneurs had installed six recharging stations for electric automobiles in New Jersey along the route from New York City to Philadelphia, making a three-state trip a realistic possibility. J. Flink, *America Adopts the Automobile, 1895-1910*, at 240 (1970).

[3] *Id.* at 166-169.

the statewide registration of motor vehicles.[4] Interstate reciprocity was an early feature of the various States' legislation. Vehicles registered in one State were permitted to travel through other States without the need for additional registration. *See, e.g., United Transp. Co. v. Hass*, 91 Misc. 311, 155 N.Y.S. 110 (1915).

Despite the States' rapid assumption of the responsibility for developing reciprocal automobile registration systems, some automotive interests were soon lobbying for federal control of motor vehicles. Thus by 1905 the American Automobile Association and the National Association of Automobile Manufacturers had begun to request Congress to enact a national motor vehicle registration law.[5] Several bills to that effect were introduced in the 59th Congress, and this early effort eventually reached its zenith in 1910, but Congress ultimately chose to leave the matter under the control of the States.[6]

3. Public Availability of Information in Motor Vehicle and Drivers' License Records.

In 1994, when the DPPA was enacted, the sponsors asserted that state law in approximately two-thirds of the States (34 States) treated motor vehicle records as open to

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[4] U.S. Department of Transportation, Federal Highway Administration, *Highway Statistics, Summary to 1975*, at 43 (1975).

[5] Flink, *supra*, 172-73.

[6] *Id.*

the public. 140 Cong. Rec. H2522 (daily ed. April 20, 1994)(statement of Rep. Moran). Another estimate was that the States were nearly evenly split in their respective approaches to public accessibility to these records. *See* Dorothy L. Glancy, *Privacy and Intelligent Transportation Technology*, 11 Santa Clara Computer and High Tech. L.J. 151, tbl. c (1995)(listing 27 States as providing public access to motor vehicle records). Whatever the exact tally prior to 1994 might be, it is apparent that substantial numbers of States by 1994 had made different policy choices about the desirability of making driver and motor vehicle records freely accessible to the public. As will be shown below, South Carolina is an example of a State which has taken a middle ground, allowing its records to be open to some extent, but only if the person making the request discloses his or her own identity.

4. The Driver's Privacy Protection Act.

The DPPA consists of a command by Congress to the States not to disclose specified information in driver's license and motor vehicle records, followed by at least fourteen exceptions. The general rule against disclosure, if a rule so exception-ridden can be said to be general at all, is found in 18 U.S.C.§ 2721(a). The exceptions are set forth in 18 U.S.C. § 2721(b)(1) through –(b)(14). Section 2721(a) provides:

> (a) IN GENERAL—Except as provided in subsection (b), a State department of motor vehicles, and any officer, employee, or contractor, thereof, shall not knowingly disclose or otherwise make available to any person or entity personal information about any individual obtained by the department in connection with a motor vehicle record.

The administration of the statute is made complicated by the number and nature of the many exceptions. Some of the exceptions involve use of the records in the operation of governments and businesses. *See, e.g.*, 18 U.S.C. § 2721(b)(1), –(b)(2), –(b)(4) (permissible to release records to government agencies exercising law enforcement and other functions); 18 U.S.C. § 2721(b)(3) (permissible to release records to "a legitimate business," but only for certain purposes). Other exceptions which 18 U.S.C. § 2721(b) permits to the general rule of nondisclosure include disclosure to insurers, disclosure to towing services, disclosure to licensed private investigators or security services, and disclosure in connection with commercial drivers and toll transportation facilities. 18 U.S.C. § 2721(b)(6), –(b)(7), –(b)(8), –(b)(9) and –(b)(10). Disclosure by consent of an individual is permitted by 18 U.S.C. § 2721(b)(13). In 18 U.S.C. § 2721(b)(11), Congress authorizes unlimited individual disclosures of the records by the States, so long as the States have first provided motor vehicle owners a clear and conspicuous way to prohibit such disclosures. Even when the States have received permission from owners to make unlimited *individual* disclosures under 18 U.S.C. § 2721(b)(11), however, the States still may not make *bulk* disclosures of motor vehicle information unless the States first provide individuals "an opportunity, in a clear and conspicuous manner, to prohibit such uses," i.e., uses involving bulk disclosures. 18 U.S.C. § 2721(b)(12)(A). The last of the fourteen exceptions permits disclosure "for any other use

specifically authorized under the law of the State that holds the record," but only if "such use is related to the operation of a motor vehicle or public safety." 18 U.S.C. § 2721(b)(14). The court in *Pryor v. Reno* concluded after reciting this list of exceptions that "Congress riddled the Act with more holes than Swiss cheese." 171 F.3d at 1284.

This complex Congressional directive to the States would require considerable effort to administer in practice. An employee or official of a Department of Motor Vehicles (DMV) would need to review each specific request in order to make a judgment whether the requested disclosure is mandated by the Act, prohibited by the Act, or permitted (in whole or in part) by one of the many exceptions. A state official would thus need to make judgment calls about the statute's application.[7] That state official would be the person who would be seen as granting or denying the request and who could bear the blame for any errors.

The state official could receive more than simply blame for erroneous decisions about whether to disclose or withhold information. The Act creates potentially severe federal penalties for erroneous decisions by state officials. A state DMV employee or official could be charged with "knowingly violat[ing] this chapter," a federal crime, and fined if found guilty. 18 U.S.C. § 2723(a). In addition, 18 U.S.C. § 2724 exposes state officials and employees to the full plethora of federal civil remedies if such persons can be

[7] The Eleventh Circuit has pointed out that the Act "contains no explicit instructions regarding the extent to which the state officer must investigate and confirm the accuracy of the claims made by individuals requesting the information." *Pryor*, 171 F.3d at 1286.

proven to have knowingly disclosed personal information from a motor vehicle record for a purpose not permitted under the Act. These remedies include actual damages of a minimum of $2,500, punitive damages if the disclosure is willfully or recklessly made, attorneys' fees, and equitable relief.[8]

The Act also contains several provisions which require the States to disclose personal information from DMV databases for certain purposes. 18 U.S.C. §2721(b). The Eleventh Circuit in *Pryor*, 171 F.3d at 1283, concluded that this part of the Act "requires" the States to make disclosures under the listed circumstances.[9]

5. South Carolina Law.

South Carolina's response to the problem of potential misuse of the information in DMV databases has been to enact legislation which requires a person requesting such information to sign a form which lists the requestor's name

[8] The impact of the Act on South Carolina was undisputed below. In South Carolina seventy field offices have full access to the federally-proscribed records. Jt. App. 16. Considerable training of numerous persons would therefore be required in order for the State to try to avoid unintentional erroneous disclosures by its officials and employees. Jt. App. 16. Even then, inconsistent results could be expected since each determination would be made on an ad hoc basis. Many or most other States probably have the same widespread access to records by field offices.

[9] The Attorney General of California has concluded that the Act requires disclosures of matters which under California law had previously not been subject to disclosure. 79 Op. Cal. Att'y. Gen. 76 (1996).

and the reason for the request. *S.C. Code Ann.* § 56-3-510 (Cum. Supp. 1999). These forms are kept for five years. Any person whose motor vehicle information is disclosed may examine the form signed by the person who requested to see the information. *S.C. Code Ann.* § 56-3-520 (Cum. Supp. 1999).[10] These statutes were enacted in 1996; the courts of South Carolina have not yet had occasion to decide whether they prohibit the bulk sale of information in the DMV databases.

In addition, unlike the Federal Constitution, the Constitution of South Carolina contains an express guarantee of the right of privacy:

> The right of the people to be secure in their persons, houses, papers, and effects against . . . unreasonable invasions of privacy shall not be violated . . . .

S.C. CONST. Art. I, §10. This provision was specifically intended to protect against the dissemination of computer database information held by state government. The drafters of this provision commented as follows:

> . . . the Committee recommends that the citizen be given constitutional protection from an unreasonable invasion of privacy by the State. This additional statement is designed

[10] South Carolina law also makes stalking a criminal offense, *S.C. Code Ann.* §§ 16-3-1700, *et seq.*, and increases the penalty if DMV records were used by the stalker. *S.C. Code Ann.* §§ 16-3-1710(C), 16-3-1720(C).

> to protect the citizen from improper use of electronic devices, computer data banks, etc. Since it is almost impossible to describe all of the devices which exist or which may be perfected in the future, the Committee recommends only a broad statement on policy, leaving details to be regulated by law and court decisions.

Final Report of the Committee to Make a Study of the South Carolina Constitution of 1895, at 15 (1969). Similar provisions exist in the constitutions of a number of other States. *See, e.g.*, CAL CONST. Art. I, § 1; ARIZ. CONST. Art. 2, § 8; FLA. CONST., Art. I, § 23.

A series of events which culminated in the first half of 1999 led to additional changes in South Carolina law. A temporary provision which had been enacted in South Carolina in 1997 and 1998 permitted the bulk sale of drivers' license information, including digitized photographs, for the prevention of fraud. S.C. Act No. 155 of 1997, Part I, § 34.15; Act No. 419 of 1998, Part I, § 36.12. Such bulk sales for fraud prevention would not have been prohibited by the DPPA even if the DPPA had been in effect in South Carolina, because that Act permits disclosures for fraud prevention. 18 U.S.C. § 2721(b)(3). Relying on the temporary provisions cited above, the state Department of Public Safety contracted with a private company for the sale of this information.

The sale of the drivers' photograph database in South Carolina and in two other States eventually became the subject of considerable publicity. *See, e.g.*, O'Harrow,

Posing a Privacy Problem? Driver's-License Photos Used in Anti-Fraud Database, Washington Post, Jan. 22, 1999 at A01. The Attorney General of South Carolina, one of the Respondents in this case, challenged the release of this database in state court, citing the above-quoted state constitutional provision protecting the right to privacy. *Condon v. Image Data, LLC*, No. 99-CP-40-0290 (Richland Co., S.C., Court of Common Pleas). Preliminary injunctive relief was denied in February 1999, but the need for injunctive relief was soon thereafter mooted by two developments. First, the Governor of South Carolina terminated the contract of sale in March 1999. Subsequently, the General Assembly of South Carolina declined to renew the temporary legislative authorization for such sales. In addition, the General Assembly addressed the most prominent privacy concerns exposed by this controversy by enacting permanent legislation which prohibited the sale by the State, or the use by anyone else, of the digitized photographs, Social Security numbers, height, weight, race or signature, when such information is obtained from drivers' license records. S.C. Act No. 33 of 1999; S.C. Act No. 100 of 1999, Part II, §§ 53, 54. Finally, a committee of the South Carolina House of Representatives has begun to make comprehensive review of state privacy laws as a result of these incidents.

SUMMARY OF ARGUMENT

The DPPA thrusts upon the States all of the day-to-day responsibility for administering its complex provisions. It therefore plainly violates the Tenth Amendment and dual sovereignty principles set forth in *New York v. United States*, 505 U.S. 144 (1992), and in *Printz v. United States*,

521 U.S. 898 (1997), by compelling the States to administer a federal regulatory program. There is no question that the DPPA creates a federal regulatory program and forces the States to administer it. As in *New York* and *Printz*, Congress has issued an unconstitutional command to the States which would make state officials the unwilling implementors of federal policy.

Since the DPPA seeks only to direct the functioning of the States' executives, it is unnecessary to analyze the Act as if it involved the incidental application to the States of laws of general applicability. The DPPA is not such a law of general applicability in any event.

Various other contentions made by the Government, including references to federal preemption doctrine, incremental regulation, and the Commerce Clause are also unavailing because of the DPPA's forced use of the States' executives to administer Congress's policy choices. Whatever might be the merits of the policies embodied in the DPPA, they cannot justify a command by Congress to the States to administer the DPPA.

The Government has abandoned its argument made below that the DPPA is a proper exercise of Congress's power to enforce the Fourteenth Amendment. Arguments to that effect by the amici are therefore not properly before the Court, and are without merit in any event.

ARGUMENT

I. THE DRIVER'S PRIVACY PROTECTION ACT VIOLATES THE PRINCIPLE OF DUAL SOVEREIGNTY.

A. The Tenth Amendment Prohibits Congress From Compelling States To Administer Federal Regulatory Programs.

In *Printz v. United States*, 521 U.S. 898 (1997), this Court reiterated its holding in *New York v. United States*, 505 U.S. 144 (1992) that "[t]he Federal Government may not compel the States to enact or administer a federal regulatory program." 521 U.S. at 933. Stated differently,

> [t]he Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers . . . to administer or enforce a federal regulatory program.

Id. at 935. *Printz* contains numerous other references to the Tenth Amendment's prohibition of federal statutes that require States to administer federal programs. 521 U.S. at 908 n.2., 915 n. 8, 923 n.12, 926, 928, 929.

By commanding the executives of the States to administer Congress's regulatory policy choices as to the release of information in state DMV records, the DPPA violates both the letter and the spirit of the holdings in *New York* and *Printz*. An affirmance of the unconstitutionality of

the DPPA requires only the straightforward application to this case of the Tenth Amendment principles set forth in *New York* and *Printz*.[11]

B. The DPPA Requires The States To Administer A Federal Regulatory Program.

The inquiry into whether a federal statute requires States to administer a federal regulatory program is not a difficult one in this case. It can hardly be denied that the DPPA would establish a federal regulatory program. The Government itself describes the Act as one which is "a regulatory act of the federal government." Pet. Br. 36.

It is likewise indisputable that the day-to-day administration of that regulatory program would be accomplished by the States. Indeed, the federal government's role in administering or even enforcing the Act is virtually nonexistent as a practical matter.

A typical administrative application of the DPPA would occur when a person requests information from a state DMV about a person in the DMV database. The state DMV official would first need to determine whether the

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[11] It is perhaps worth noting that the DPPA, like the Brady Act involved in *Printz*, was enacted by the 103rd Congress several years before *Printz* was decided. The three-year delay in the DPPA's effective date accounts for the various States' challenges to the DPPA not reaching this Court until now. In other words, the DPPA was not drafted with *Printz* in mind, because this Court's decision in *Printz* was still several years in the future when the DPPA was enacted.

request seeks "personal information" as defined by the DPPA. If so, the state DMV official would then need to ascertain whether the request falls within one of the mandatory disclosure provisions of the DPPA, 18 U.S.C. § 2721(b). If disclosure is not mandated but instead appears to be prohibited by the general rule of nondisclosure, the state DMV official would then be required to determine whether the request falls within one of the DPPA's many permissive exceptions to the general rule. The DPPA provides no guidance for determining how credible a claim of exemption must be. If the requestor cannot manage to fit the request within one or more of the Act's fourteen or more exemptions, the DPPA would require the state DMV official to refuse the request. The nature of this laborious process, which would be repeated countless times daily across the nation, leaves no doubt that State DMV officials are the ones upon whom Congress has thrust the duty of administering the DPPA's commands.[12]

Under the DPPA, a state official would thus stand between the requestor and the requested information, just as under the Brady Act a state or local official would stand between a prospective handgun buyer and the purchase of the gun. The DPPA would make state officials the gatekeepers for state information, not because the *States* have decided the information is private, but because *Congress* has so decided. As in *Printz*, "it will be the [state official] and not some federal official who stands between [the requestor and his or her request]. And it will likely be

[12] The record in *Oklahoma v. United States, supra*, indicated that that State processed approximately one million requests for motor vehicle information every year. 161 F.3d at 1268.

the [state official], not some federal official, who will be blamed for any error . . . ." 521 U.S. at 930.

The Government does not expressly deny that the DPPA requires the States to administer a federal regulatory program. This failure of the Government to address this aspect of *New York* and *Printz* does not appear to be inadvertent. Instead it is a reflection of the fundamental and fatal inconsistency between the Government's arguments in this case and the holdings of those cases. Respondents reiterate what the Government cannot bring itself to deny: the DPPA does indeed require the States to administer a federal regulatory program. The practical reality of the matter is that the DPPA commands the States to maintain a broad and ongoing administrative effort, all directed only toward implementing the policy choices of Congress.

C. By Blurring Political Accountability, The DPPA Violates Dual Sovereignty Principles.

By requiring the States to administer a federal regulatory program, the DPPA violates the rule expressed in the literal language of *New York* and *Printz*. *See Printz*, 521 U.S. at 935 (federal government may not "command the States' officers . . . to administer or enforce a federal regulatory program"). In so doing, it permits Congress to regulate vicariously, using the States as the front line administrators of the program, and also permits confusion in the public eye as to the source of the regulation. Denial by state officials of access to government records will always look like state government action for the simple reason that it is, in fact, state government action; statutes such as the

DPPA permit confusion about which government is acting. Such blurring of political accountability cannot occur when, for instance, the Video Privacy Protection Act of 1988, 18 U.S.C. § 2710, is applied by a private person such as a video store owner, whom no one would mistake for a government official.

The structure of federalism in this country was specifically designed to avoid the kind of involuntary transfer of political accountability from the Federal Government to the States that the DPPA seeks to accomplish. As *New York* holds, "[i]n the end, the Convention opted for a Constitution in which Congress would exercise its legislative authority directly over individuals rather than over States . . . ." 505 U.S. at 165. The result of this structural arrangement was to avoid diminution of accountability for both state and federal officials. *Id.* at 168-69. Otherwise Congress could govern, as it has sought to do here, as one sovereign hiding behind the other, governing by proxy and by stealth. If this Court were to approve any form of Congressional ability to exercise power in this sleight-of-hand fashion, Congress might soon find this method of governing irresistible.

One aspect of the blurring of accountability which is caused by a statute such as the DPPA is that "[m]embers of Congress can take credit for 'solving' problems" without requiring the federal government to incur the financial or other burdens of administering the statute. *Printz*, 521 U.S. at 930. One need only read the comments of some of the DPPA's sponsors and advocates to see that this is exactly what happened when the DPPA was enacted. *See generally* 139 Cong. Rec. 29,466-29,470 (1993). A great deal of

federal credit was taken for what would prove to be an enormous state effort. Most federal involvement ended with the Act's passage, while the States were saddled with the daily burden of administering the Act into the indefinite future.

In addition to pointing to the absence of political accountability in a system where the federal government could command the States to regulate, *Printz* also identified several other reasons underlying its holding. The Court first conducted a review of the history of federal-state relations and found that history to be "[b]ereft of a single early, or indeed even pre-20th-century, statute compelling state executive officers to administer federal laws. . . ." 521 U.S. at 908 n.2. Such an avoidance by Congress of this "highly attractive power," 521 U.S. at 905, provided "reason to believe that the power was thought not to exist." *Id.* The nonexistence of the power was also held to follow from statements of the Framers, as set forth in detail in *New York*, 505 U.S. at 161-66.

The division of power between the state and federal governments, *Printz* reaffirms, is "one of the Constitution's structural protections of liberty." 521 U.S. at 921. By dividing and balancing power between state and federal governments, this separation of powers "reduce[s] the risk of tyranny and abuse from either front." *Id.*, quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). The federal government's share of constitutional power, *Printz* holds, would be "augmented immeasurably if it were to impress into its service–and at no cost to itself–the police officers of the 50 States." 521 U.S. at 922. The same augmentation of power would occur if the federal government could

accomplish its goals through the use of the DMV employees of the 50 States.

In contrast to the coerced use of States as federal agents, there are many federal statutes which encourage States to adopt federal policy, either through attaching conditions to the receipt of federal funds or through allowing the States to regulate activity under federal standards as an alternative to federal preemption of the entire regulatory effort. *See New York*, 505 U.S. at 166-69. Statutes of both kinds have become so commonplace that perhaps it was easy for Congress to overlook the radical nature of a statute which crosses the line from encouragement to coercion. But if Congress were able to conscript state governments into its service with no more basis than a Commerce Clause nexus, the nature of federalism would be altered beyond recognition. If this Court were to offer any suggestion that Congress possesses this "highly attractive power" to regulate vicariously, *Printz*, 521 U.S. at 905, it could be expected that Congress would have little difficulty finding other ways to put the States' executives to work.

D. Other Standards Asserted By The Government Are Not Found In This Court's Jurisprudence And Are Not Implicated By The DPPA.

The Government asserts that the DPPA does not violate dual sovereignty because it does not "require state governments or officers [either] to regulate the primary activities of private parties or to participate in the enforcement of federal law against private actors." Pet. Br.

27.[13] It is questionable whether this formulation accurately summarizes this Court's precedent, but even if it does, the operation of the DPPA possesses both of these characteristics.

The contention that the DPPA does not require States to regulate "primary conduct," Pet. Br. 18, 33, is simply incorrect. Regulation can occur through negative commands as well as through those which impose positive duties. Thus, for example, the prohibition of access to information is as much a regulation of conduct as the prohibition of access to a physical location. Under the Government's suggested concept of what constitutes regulation, a person who builds a fence with a locked gate around a tract of land would not be regulating access to that tract.

Moreover, this concept of the States' role being one of merely passive decliners of requests to view records is not truly accurate. In most cases, of course, a denial of access by a state DMV official would end the matter, but if, for example, someone were to attempt to use force in order to view the requested records on a DMV computer screen, it can hardly be imagined that state officials would sit by passively and allow the records to be examined. State officials would need to take affirmative steps to prevent this intrusion, and indeed could be committing a federal crime themselves if they did not take such steps. Even if this

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[13] By stating that only one of these attributes need be present, the Government tacitly concedes the holding of *Printz* that a statute can violate dual sovereignty even if it imposes no enforcement duties on the States.

example is unlikely, its very unlikeliness is proof that the prohibitions of the DPPA derive most of their strength from the governmental power of the States rather than from that of the federal government.

New York, moreover, explicitly recognized that Congress cannot impose duties on the States regardless of whether the duties imposed are mandatory or prohibitory in nature. As the Court summarized its historical review in that case:

> We have always understood that even where Congress has the authority . . . to pass laws *requiring or prohibiting* certain acts, it lacks the power directly to compel the States to *require or prohibit* those acts.

505 U.S. at 166 (emphasis added). Thus, even if the role of the States were nothing more than to prohibit access to their DMV records, this would constitute regulation of primary conduct under both the language of *New York* and under normal concepts of the nature of regulation.

The Government also claims that the DPPA is valid because it does not require the States to "participate in the enforcement of federal law against private actors." Pet. Br. 27. It is unclear exactly what is meant by this phrase. When *Printz* speaks of state participation, it speaks only of participation in the administration or implementation of the federal regulatory scheme, rather than participation in its enforcement. 521 U.S. at 904, 917-18, 934. As already discussed, the DPPA unquestionably forces the States to

participate in the administration and implementation of its provisions.

If, on the other hand, the Government means to suggest that a federal statute is unconstitutional only if it requires States directly to enforce the federal law against private parties, such an argument departs from the holding of *Printz*, which concluded that Congress may not require the States "to administer *or* enforce a federal regulatory program." 521 U.S. at 935 (emphasis added). The Court's use of the disjunctive reflects that the Brady Act required no direct enforcement activities by state officials. Instead, that statute required only that local law enforcement officials make a check, usually a computer check, to determine whether a proposed gun sale would be lawful. 521 U.S. at 903. The local law enforcement officer was not even required by the Brady Act to prevent sales determined to be unlawful. *Id.* Since enforcement of the gun control provisions of the Brady Act remained with federal authorities, the Court characterized the role of local law enforcement officials as one "in the *administration* of a federally enacted regulatory scheme." *Id.* at 904 (emphasis added). Clearly, as *Printz* indicates, a Tenth Amendment violation can occur without regard to whether direct enforcement is made a duty of state officials. In any event, as already shown, it is possible that state officials might need to take affirmative enforcement steps if someone forcefully sought access to the records in some fashion.

If the need for state enforcement efforts, as opposed to state administrative efforts, would be rare, the need for federal enforcement efforts would be rarer still. In contrast to the daily administrative efforts which the DPPA requires

of the States, any federal enforcement activity under the Act would occur only under extraordinary circumstances. The Act's principal enforcement mechanism for the wrongful disclosure of information does not require activity by the federal government at all. The Act instead creates a private civil action for damages by the person to whom the information pertains. 18 U.S.C. § 2724. Federal activities are limited primarily to criminal enforcement where there is willful disclosure or obtaining of information, or the obtaining of information by making false representations. 18 U.S.C. §§ 2722, 2723(a). Federal actions against the States for civil penalties of $5,000 per day are also authorized, but only in cases where the State has a policy or practice of substantial noncompliance. Federal enforcement activities are thus likely to be reserved for rare and unusual cases, which means that the amount of federal effort needed to implement the DPPA pales beside the ongoing daily administrative efforts which the Act requires of the States. The DPPA places the States on the front lines, allowing the federal presence to rest so far behind the lines as to be invisible.

II. BECAUSE OF THE MANNER IN WHICH THE DPPA UNCONSTITUTIONALLY ENCROACHES ON DUAL SOVEREIGNTY, A "BALANCING" ANALYSIS IS UNNECESSARY.

Printz holds that where the challenged statute involves "the forced participation of the States' executive in the actual administration of a federal program," 521 U.S. at 918, there is no need to consider "whether the incidental

application to the States of a federal law of general applicability excessively interfered with the functioning of state governments." *Id.* at 932. The Court declined to engage in the balancing analysis of earlier Tenth Amendment cases such as *South Carolina v. Baker*, 485 U.S. 505 (1988), concluding instead that since "the whole *object* of the law [was] to direct the functioning of the state executive," such balancing was "inappropriate." *Id.* (emphasis in original).

As in *Printz*, there is no doubt in this case that "the whole object" of 18 U.S.C. § 2721(a) is "to direct the functioning of the state executive." That section covers no one but state officials, and directs them not to disclose information in state records. Like the Brady Act, the DPPA requires state officials to act, or refrain from acting, only in their official capacities, with regard only to official records. And as in *Printz*, "the suggestion that extension of this statute to private citizens would eliminate the constitutional problem posits the impossible." *Id.* at 932 n.17.

Once Congress seeks to direct the functioning of the state executive, *Printz* holds, the statute "compromise[s] the structural framework of dual sovereignty." 521 U.S. at 932. This renders the balancing analysis of cases such as *Baker* inappropriate, because

> [i]t is the very *principle* of separate state sovereignty that such a law offends, and no comparative assessment of the various interests can overcome that fundamental defect.

Id. (emphasis in original). The DPPA possesses the same "fundamental defect."[14]

III. THE DPPA IS NOT A LAW OF GENERAL APPLICABILITY WHICH INCIDENTALLY APPLIES TO THE STATES.

There is no question that 18 U.S.C. § 2721 applies only to records held by the States. Nevertheless, the Government devotes over half of its argument (Pet Br. 32-48) to an attempt to analyze this statute as if it were one of general applicability, in turn inviting this Court to reach the balancing analysis which *Printz* concluded it was unnecessary to reach. For the reasons set forth in Question II above, the Court need not address these arguments, but even if addressed they are unavailing.

This Court has held that the Tenth Amendment is not necessarily violated when "Congress has subjected a State to the same legislation applicable to private parties." *New York*, 505 U.S. at 161. *See also Printz*, 521 U.S. at 932

[14] The Government also asserts that the DPPA should be upheld because it does not impair the sovereign functions of the States. Pet. Br. 32-33 & n.14. This argument is nothing more than another invocation of the balancing test which has no application once Congress has commandeered the States' executive to administer a law which applies only to the States. In *College Savings Bank v. Florida Prepaid Postsecondary Ed. Exp. Bd.*, 119 S.Ct. 2219, 2226-2231(1999), this Court rejected a similar argument by the United States that the constitutional privileges of the States should turn on whether a State voluntarily participates in activities which are arguably removed from core state functions.

("incidental application to the States of a federal law of general applicability").

The Government asserts that there is no "rigid constitutional rule" requiring that Congress only subject state governments to generally applicable laws. Pet. Br. 37. However, the only cases cited by the Government are those in which the statutes were indeed laws of general applicability, and were later characterized by this Court as such. *New York*, 505 U.S. at 161; *Printz*, 521 U.S. at 932. The Government can cite no case which upholds a law applying solely to States and compelling them to administer a federal regulatory program. To the contrary, general applicability is a characteristic of every statute upheld against Tenth Amendment challenge in the cases cited by the Government at Pet. Br. 34-38. This was true not only in such cases as *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (Fair Labor Standards Act) and *EEOC v. Wyoming*, 460 U.S. 226 (1983)(Age Discrimination in Employment Act), but also in *South Carolina v. Baker*, *supra*. In *Baker*, the statute at issue was aimed at "tax evasion concerns *posed generally* by unregistered bonds . . . ." 485 U.S. at 510 (emphasis added). As a result, "it cover[ed] not only state bonds but also bonds issued by the United States and private corporations." *Id.*[15] The remaining cases cited by the Government likewise involved the incidental application to the States of generally

[15] Since *Baker* involved a statute which applied also to private persons and to the federal government, the Court's approval of that statute as one which in that context "regulate[d] state activities," 485 U.S. at 514, was simply another reference to the incidental application of a general law to the States.

applicable statutes. *See Maryland v. Wirtz*, 392 U.S. 183 (1968)(Fair Labor Standards Act); *Fry v. United States*, 421 U.S. 542 (1975)(Economic Stabilization Act of 1970); *United Transp. Union v. Long Island R.R.*, 455 U.S. 678 (1982)(Railway Labor Act).

Contrary to this Court's own characterization of these cases, the Government argues that they should instead be viewed as cases where the statutes "did not commandeer or conscript state governments in their own regulatory role." Pet. Br. 36. It bears repeating that this is not an accurate statement of the holding in *Printz*, which was that the States could not be forced to "administer or enforce a federal regulatory program." 521 U.S. at 935. Nevertheless, the Government essentially restates its argument that a federal statute will not be voided unless it requires state governments to "regulate private conduct." Pet. Br. 30. Since the DPPA does conscript state governments to regulate, this argument by the Government is no more availing in this guise than it was earlier.

When the States are subjected to statutes which apply generally, such statutes apply so broadly that they are unlikely to be mistaken for governmental policy choices by the States. The blurring of political accountability is greatly lessened in such instances. In addition, the characteristic of general applicability is a built-in protection against the possibility that the States will be singled out as entities to effectuate federal policy. This Court has recognized in a First Amendment tax case, for example, that when a protected interest is singled out for special legislative treatment, "the political constraints that prevent a legislature from passing crippling taxes of general applicability are

weakened, and the threat of burdensome taxes becomes acute." *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 585 (1983). In the same way, when only the States are subjected to a Congressional enactment, the political constraints against excesses in the statute are likewise weakened.[16]

IV. ADDITIONAL ARGUMENTS MADE BY THE GOVERNMENT ARE INAPPOSITE.

Beginning at Pet. Br. 34, the Government makes several other arguments for sustaining the statute's constitutionality. For the reasons set forth below, none of these arguments apply to the statute at issue in this case.

A. The DPPA Cannot Be Sustained As A Valid Exercise Of Commerce Clause Power Or Of Federal Preemption.

The Government's brief is permeated with references to the Commerce Clause power of Congress. There is probably little question that Congress has the power under the Commerce Clause to prevent the dissemination by

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[16] This rationale for permitting laws of general applicability to apply to States is developed more fully in the amicus brief of the State of Alabama, et al. The Government, quoting the 7th Circuit in *Travis*, *supra*, parodies the rationale of "general applicability" cases as one in which a statute is validated only if it achieves "Brobdignagian" size. Pet. Br. 42. It is simply a truism that the broader the application of a proposed statute, the less likely its chances of adversely affecting a single class.

private persons of personal information in databases. Nevertheless, as this Court held in *New York*,

> even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts. [Citations omitted] The allocation of power contained in the Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate State governments' regulation of interstate commerce.

505 U.S. at 166. Accordingly, the Government's argument is not advanced by references to the Commerce Clause power of Congress when such power is exercised in a manner which overrides the dual sovereignty protections of the Tenth Amendment.

The Government also suggests that if this Court concludes that the DPPA is unconstitutional, such a holding would be "difficult to square with this Court's preemption jurisprudence." Pet. Br. 38. The DPPA, however, bears no resemblance to a federal statute preempting state regulation of interstate commerce. A federal statute preempting state legislation is one which displaces all state action, rather than compelling specific state actions. Where federal law properly preempts state law, there is no room for doubt that the federal government is responsible for all regulatory activity. Wherever preemption occurs, the States are simply shut out of the process.

As indicated in the Statement (p. 3, *supra*), the possibility that Congress might assume control over the registration of automobiles and drivers has been asserted since the earliest days of motoring. Congress, however, has always chosen to leave these duties to the States, even after broader Commerce Clause powers came to be recognized later in the century. This Court has recognized that Congressional directives to the States which fall short of full preemption are "more troublesome" than a simple federal assumption of control over the particular field. *FERC v. Mississippi*, 456 U.S. 742, 759 (1982). *See also id.* at 787 (separate opinion of O'Connor, J.). If Congress were to choose to preempt state motor vehicle regulations, the powers of the States would obviously be cut back more severely than in the case of the DPPA, but much more would be required of federal authorities than in the case of the DPPA, where practically no federal activity is involved. The sheer size and cost of a true preemption of state law in this area is a substantial deterrent to any Congressional effort to regulate motor vehicles generally. However, even if federal preemption were to occur, it would carry a benefit for the States which the DPPA does not: if Congress were to regulate registration itself, the resources of the States could be devoted to other matters. *FERC*, 456 U.S. at 787 (separate opinion of O'Connor, J.).

B. The DPPA Cannot Be Sustained As A Valid Instance Of Incremental Regulation.

Equally inapplicable to this case is the concept of incremental regulation, the concept that "reform may take one step at a time." *Williamson v. Lee Optical, Inc.*, 348

U.S. 483 (1955). *See* Pet Br. 39-45. The question once again is not one of *what* Congress may regulate, but instead is one of *how* Congress must regulate. This Court's Tenth Amendment jurisprudence holds that Congress may not use the States as implements of regulation.

It would not necessarily be impossible for Congress to limit the practical ability of persons to access state DMV records. For instance, the DPPA itself contains a suggestion as to how some of Congress's purpose might be furthered without violating the Tenth Amendment. To the extent the DPPA is an effort by Congress to regulate the interstate commercial use of personal information by direct marketers and others, this problem is probably capable of solution by direct federal regulation of the marketers themselves. If 18 U.S.C. § 2722(a), which prohibits the disclosure of DMV information by "any person," had been limited to private individuals, Tenth Amendment problems might have been avoided because Congress would then have regulated private individuals directly.[17] Congress's decision instead to place on the States the burden of regulating access to DMV records simply illustrates again why the DPPA is an impermissible shortcut.

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[17] Neither the courts below nor the parties have addressed the issue of whether 18 U.S.C. § 2722, if read to apply only to private parties, might be upheld to a limited extent. Respondents would suggest that the language of 18 U.S.C. § 2722, which applies to state officials as well as private persons, is nevertheless not severable, because "this Court may impose a limiting construction on a statute only if it is readily susceptible to such a construction." *Reno v. American Civil Liberties Union*, 521 U.S. 844, 884 (1997)(internal quotation marks omitted). There is nothing about this section which would support a limiting construction.

The impetus for this legislation nevertheless was not the issue of bulk sales. Instead, the Act's passage was driven by the attempt to address stalking and other crimes. *See, e.g.*, 140 Cong. Rec. H2526-27 (statement of Rep. Goss)(daily ed. April 20, 1994). The antistalking aspect of the DPPA, while certainly well-intentioned, would appear to be another instance of the rejected argument that Congress has the power to "regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce." *United States v. Lopez*, 514 U.S. 549, 564 (1995). In other words, even if there were no other way for Congress to address this perceived problem, that difficulty reflects the reality that "Congress has vast power but not all power." *Alden v. Maine*, 119 S.Ct. 2240, 2268 (1999).

V. THE STRUCTURE OF THE DPPA RENDERS IRRELEVANT THE MERITS OF ITS POLICIES.

The Government and its amici suggest throughout their briefs that the policies embodied in the DPPA are worthy ones which effectively would justify a holding that the statute is constitutional. *New York* holds, however, that even if the statute addresses a "pressing national problem, . . . a judiciary that licensed extraconstitutional government with each issue of comparable gravity would, in the long run, be far worse." 505 U.S. at 187-188. *Accord*, *Printz*, 521 U.S. at 933 (quoting *New York*'s holding, 505 U.S. at 187, that separation of powers provides a means to "resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day"). This rule applies *a fortiori* in the present case, which involves

legitimate concerns, but none so intractable as the issue of disposal of nuclear waste, nor so pervasive as the sale of handguns to convicted felons and others.

Even if a statute's policy could insulate it from Tenth Amendment scrutiny, the DPPA in any event is a fairly inefficient means for executing its asserted policies. Its numerous exceptions could probably be evaded by any determined stalker, especially since the Act contains no standards for verifying that a request validly falls within one of the exceptions. Its prohibition on bulk sales was so weak that it did not prevent the motor vehicle departments of several States from selling all information in their databases, including digitized photographs and signatures, to a company whose asserted use for the records was the prevention of identity fraud. These sales were apparently permitted disclosures under 18 U.S.C. § 2721(b)(3)(allowing businesses to "verify the accuracy of personal information" submitted by individuals).

The present case is an illustration of how state law can address a problem more completely or effectively than federal law. For instance, South Carolina's statute would appear to be a simpler and more practical deterrent to stalkers. The DPPA attempts to engineer its policies with great precision, but in the process the rule is practically lost in its exceptions. The South Carolina statute simply requires that any individual who requests personal information from the state DMV must also disclose his or her name; it also permits the subject of the request to find out who has requested such information about him or her in the previous five years. §§ 56-3-510, -520, *S.C. Code Ann.* (Cum. Supp. 1999). While no method of deterring stalkers (and least of

all the DPPA) can be completely effective, the South Carolina approach would seem to have a better chance of preventing this crime, since the South Carolina statute strips away the desire for anonymity which lies at the heart of the crime of stalking. Moreover, the amendments to South Carolina law which followed the disclosure that photographs and signatures had been sold provide an example of how state governments can provide a rapid and efficient response to a problem which Congress has only imperfectly addressed.

Even worse than the limited effectiveness of the DPPA is its tendency to stifle more innovative or effective solutions by the States. Just as this kind of statute reduces the political accountability of Congress, it also can have the effect of discouraging initiative on the part of state legislatures. Even as members of Congress can take credit for "solving" a problem, their efforts, however ineffective, can also induce state legislators to conclude that the problem has been solved, or at least solved well enough, so that further innovation in the area ends. *See generally FERC, supra*, 456 U.S. at 788-790 (separate opinion of O'Connor, J.).

VI. THE GOVERNMENT HAS EXPRESSLY ABANDONED ITS CONTENTION THAT THE DPPA IS AN EXERCISE OF CONGRESS'S POWER UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT.

As already noted, the Government expressly abandoned its argument made and rejected below that the

DPPA could be sustained as an exercise of Congress's power to enforce the Fourteenth Amendment.[18] U.S. Cert. Reply Mem. 2. That issue nevertheless is raised by all three amici who filed briefs in support of the Government's position.

Respondents submit that this issue should not be considered as a basis for reversal. Rule 14.1 (a) of the Rules of this Court provides in part that "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court." *Dion v. United States*, 476 U.S. 734, 746 (1986). This rule should particularly apply where the Petitioner has expressly disavowed a ground for reversal.

Even if the Court were to reach the issue, however, it is patently without merit. No case decided by this Court holds or suggests that there is a federal constitutional right of privacy in these records.[19] Absent an established federal constitutional right, "[a]ny suggestion that Congress has a substantive, non-remedial power under the Fourteenth Amendment is not supported by our case law." *City of Boerne v. Flores*, 521 U.S. 507, 527 (1997).

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[18] The Government's Fourteenth Amendment argument was rejected by both circuits which reached it. Pet. App. 22a-26a; *Pryor, supra,* 171 F.3d at 1288 n.10.

[19] The absence of a *federal* constitutional right does not, however, mean that the *States* cannot create such a right of privacy, either through state constitutions or state statutes. As set forth above, South Carolina is among the States in which state law creates rights of privacy.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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JANET RENO, ATTORNEY GENERAL
OF THE UNITED STATES, ET AL., PETITIONERS

v.

CHARLIE CONDON, ATTORNEY GENERAL
FOR THE STATE OF SOUTH CAROLINA, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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As we explain in our opening brief (at 39-42), the Driver's Privacy Protection Act of 1994 (DPPA or Act), 18 U.S.C. 2721-2725 (1994 & Supp. III 1997), is one of several statutes enacted by Congress to address concerns raised by the dissemination of personal information. Federal statutes control the circumstances in which specified private entities such as video stores, cable television companies, and credit bureaus may disclose personal information without the consent of the individual to whom the information pertains. Other statutes govern the circumstances in which federal agencies may disclose the personal information that they gather about private individuals. In similar fashion, the DPPA addresses the particular concerns posed by the disclosure of personal information by state departments of motor vehicles (DMVs). Like the statutes that regulate disclosures by private entities and by the federal government, the DPPA is tailored to address concerns about intrusions on privacy raised by the specific type of record covered by the statute; it also permits dissemination in circumstances where Congress found an important public interest in disclosure of the information in that particular kind of record.

Respondents assert that Congress's extension of federal regulation of the dissemination of personal information to state DMV records is invalid for two principal reasons. First, they argue that the DPPA, like the statutes invalidated in *New York* v. *United States*, 505 U.S. 144 (1992), and *Printz* v. *United States*, 521 U.S. 898 (1997), commandeers the States into federal service by requiring them to enact or implement a federal regulatory scheme. See Resp. Br. 12-22. Second, they urge that Congress may not impose any regulations on state entities that engage in commerce unless Congress also imposes the same regulations on private persons. See *id.* at 24-27. Neither argument has merit.

1. *The DPPA Is Within Congress's Enumerated Powers.*

As a threshold matter, as we show in our opening brief (at 21-23), there can be no doubt that the DPPA regulates activity that is subject to Congress's power under the Commerce Clause, U.S. Const. Art. I, § 8, Cl. 3. Respondents do not argue otherwise. Respondents have therefore waived any argument that the DPPA exceeds Congress's enumerated powers, and the Court should decline to address the argument made by amicus curiae Pacific Legal Foundation (PLF) that the DPPA exceeds Congress's commerce power. See *Robertson* v. *Seattle Audubon Soc'y*, 503 U.S. 429, 441 (1992) (declining to address an argument urged only by amicus curiae).

In any event, PLF's arguments cast no doubt on the DPPA's firm grounding in the Commerce Clause. PLF asserts without substantiation (PLF Br. 5, 6) that States charge only "administrative fees" for motor vehicle records, by which it apparently means fees that cover only the cost of supplying the information. Respondents, however, have made no such claim on behalf of the State of South Carolina. Moreover, the State of Wisconsin, which has also challenged the DPPA, has acknowledged that it has done so in part to protect the $8 million it receives each year from sales of motor vehicle record information.[1] Congress also heard testimony that New York earned $17 million in one year from individuals and businesses that used the State's computers to examine motor vehicle records. See 1994 WL

[1] See Affidavit of James S. Thiel, General Counsel, Wis. Dep't of Transp., In Support Of Motion To Realign State Defendants As Plaintiffs ¶ 8 (Dec. 8, 1997), *Division of Motor Vehicles of Wis. Dep't of Transp.* v. *Reno*, petition for cert. pending, No. 98-1818 (affidavit lodged with the Clerk). Wisconsin charges only three dollars per motor vehicle record. *Ibid.* Thus, even relatively small fees, when aggregated, can produce a substantial revenue stream for a state DMV.

212813 (Feb. 3, 1994) (statement of Janlori Goldman, American Civil Liberties Union).

Moreover, Congress's regulatory power under the Commerce Clause is not limited to situations in which those subject to regulation earn a profit from the regulated activity. It is sufficient in this case that state DMVs acquire the information at issue in connection with activities (the owning and operating of motor vehicles) intimately tied to interstate commerce, that personal information in state DMV records has considerable commercial value, and that the automobile industry and national direct marketing companies rely heavily on that information in their national marketing efforts. See Gov't Br. 4-5. The DPPA thus regulates activities in or affecting interstate commerce in the plainest way.

It is also well settled that Congress may exercise its regulatory power to keep the channels of commerce free of "immoral and injurious uses." *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 256 (1964). Congress has done so in the DPPA by acting to ensure that commerce in personal information does not facilitate stalking, identity fraud, and invasions of privacy. The Act also plainly protects interstate commerce and the channels of commerce by ensuring that access to the Nation's highways is not conditioned upon drivers being subjected to threats to their safety and privacy.[2]

[2] Respondents and their amici attempt to cast doubt on the validity of the DPPA by arguing that the Act was intended to protect privacy and personal safety, not commerce. The DPPA does regulate the commercial use of motor vehicle information, however, in significant ways. For example, the DPPA prohibits state DMVs from disclosing personal information for use in surveys, marketing, and solicitation, unless individuals are provided an opportunity, in a clear and conspicuous manner, to block such use of information pertaining to them. See 18 U.S.C. 2721(b)(12). More fundamentally, however, this Court has repeatedly made clear that Congress may exercise its Commerce Clause power to address any legitimate goal, whether or not the particular problem being addressed is predominantly

2. *The DPPA Does Not Commandeer State Governments.*

Respondents and their amici contend that this case is controlled by *New York* and *Printz*. See Resp. Br. 12-24; National Conference of State Legislatures *et al.* (NCSL) Br. 3-24; PLF Br. 11-22. Their arguments conflate compliance with commandeering, and they ignore the fundamental distinctions between the DPPA and the statutes at issue in *New York* and *Printz*.

a. The DPPA directly regulates the practices of state entities by restricting their disclosure of information. The statute addresses the threats to privacy and safety posed by DMV disclosures made without a driver's consent. In sharp distinction, the statutes at issue in *New York* and *Printz* commanded the States to implement federal schemes that regulated private persons and that addressed problems neither created nor exacerbated by the States' own activities.

The statute at issue in *New York* required the States either to regulate the way private entities dispose of low-level radioactive waste, or to take title to that waste and assume liability for the private generators' damages. See *New York*, 505 U.S. at 153-154. Both provisions effectively required the States to adopt a regulatory solution to problems created by private conduct. As the Court explained, imposing an affirmative obligation on the States to take title to the private waste was "no different than a congressionally compelled subsidy from state governments to radioactive waste producers," and requiring the States to assume liability for the generators' damages was "indistinguishable from an Act of Congress directing the States to assume the liabilities of certain state residents." *Id.* at 175. On the other

commercial in character. See, *e.g.*, *Heart of Atlanta Motel*, 379 U.S. at 256-257; *United States* v. *Darby*, 312 U.S. 100, 114-115 (1941); *Caminetti* v. *United States*, 242 U.S. 470, 491 (1917); *Champion* v. *Ames*, 188 U.S. 321, 356 (1903).

hand, the option of "regulating pursuant to Congress' direction" presented "a simple command to state governments to implement legislation enacted by Congress." *Id.* at 175-176. The Court concluded that, "[e]ither way, the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *Id.* at 176 (citation and internal quotation marks omitted); see also *Printz*, 521 U.S. at 926 (explaining that both options presented in *New York* "effectively requir[ed] the States either to legislate pursuant to Congress's directions, or to implement an administrative solution").[3]

Similarly, the statute at issue in *Printz* required state officials to make reasonable efforts to determine whether proposed handgun sales by private sellers to private buyers would violate federal law. See *Printz*, 521 U.S. at 903. As in *New York*, the provision was invalidated because it "dragooned" state governments into addressing problems in the private sector that were not of their own making, and to do so by implementing a federally prescribed regulatory solution to those problems. *Id.* at 928.[4]

[3] Amici NCSL *et al.* are therefore incorrect in arguing (NCSL Br. 10-11) that the Court did not understand the "take title" provision invalidated in *New York* as "requir[ing] state governments or officers to regulate the primary activities of private parties." When the Court concluded that the "take title" provision impermissibly compelled the State to enact or enforce a federal regulatory program, it plainly understood that the State would have to do more than simply take title to the radioactive waste; the State would also have to develop some legislative or administrative solution for the problems presented by the waste to which it took title. Moreover, the Court analogized the "take title" provision to a coerced subsidy of waste producers by the State. 505 U.S. at 175. Such a subsidy would be a regulation of the primary, private conduct of producing radioactive waste, as would be a compelled state assumption of the private waste producers' liabilities (*ibid.*).

[4] Respondents argue (Resp. Br. 19) that the DPPA does impermissibly commandeer the States into "regulating" private individuals, because it requires the state DMVs in some circumstances to withhold information

No such commandeering occurs when the federal government directly regulates the conduct of state entities. The Court did not suggest in *New York*, for example, that Congress may not regulate a state entity's own production and disposal of radioactive waste.[5] Nor did the Court suggest in

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that individuals request from the state DMV. Such "prohibition of access" to the requested information, respondents maintain, is tantamount to regulation of the individuals who request access. There is no support for respondents' position that direct federal regulation of state activity is transmuted into "commandeering" of the State's regulatory machinery merely because of its indirect effect on private persons, and applying respondents' position to other contexts shows that it is implausible. For example, as we have observed (Gov't Br. 44), the federal government may issue security directives to govern the operation of major airports, even if those airports happen to be owned and operated by state and local governments. Respondents have not disputed that point. But if respondents' understanding of "commandeering" were correct, then the federal government could not require that access to the tarmac and baggage handling areas at such airports be restricted to persons with valid security clearances, because such a requirement would impermissibly require state and local governments that operate the airports to "regulate" those persons barred from the sensitive areas of the airport because they did not have the necessary clearances. Respondents' argument cuts the concept of "commandeering" loose from its tether.

[5] Under our constitutional structure of federalism, Congress could conclude that the sale of certain highly dangerous products should be undertaken *only* by state entities (if at all), and not by private parties. Such a regulation would be unobjectionable under the Commerce Clause. Under respondents' theory of "commandeering," however, if Congress did confine the sale of such dangerous products to state entities, Congress would be barred by the Tenth Amendment from imposing safety regulations on the state entities permitted to make such sales. Yet respondents cannot dispute that, if both state and private entities were permitted to make such sales of dangerous products, Congress could validly make the very same safety regulations applicable to state entities (because respondents agree that "generally applicable" legislation may be applied to state entities). Thus, under respondents' reasoning, the validity of congressional regulation as applied to state activity does not depend on anything of substance in the regulation; it depends entirely on whether the regulation also applies to someone *other* than the State. That approach bears little relation to the principles of federalism that underlie the Court's decisions in *New York* and *Printz*. See also Gov't Br. 45-48.

Printz that Congress may not impose regulatory requirements on state entities that themselves engage in the sale of handguns. Such regulation of the state entities' own conduct would not commandeer state legislatures or officials into enacting or enforcing a federal scheme for the regulation of private conduct. When, as in the DPPA, Congress regulates state conduct directly, the state entities engaged in that conduct are themselves the subject of the federal regulation; Congress does not "impress" state officials "into its service," see Resp. Br. 17 (quoting *Printz*, 521 U.S. at 922), or render them agents of the federal government. The state entities regulated by the DPPA are no more called upon to enforce a federal scheme than are private parties who are subject to federal regulation.

b. Respondents protest (Resp. Br. 13-14), however, that compliance with the DPPA will entail administrative burdens. But as we explain in our opening brief (Gov't Br. 30-32), in *South Carolina* v. *Baker*, 485 U.S. 505 (1988), the Court firmly rejected the contention that a federal law directly regulating state activity would be invalid merely because the States, as a practical matter, might need to devote substantial effort to bring themselves into compliance with the federal law, including changing their legislation and administrative practices. The Court made clear that the need to take "administrative and sometimes legislative action to comply with federal standards regulating that activity is a commonplace that presents no constitutional defect." *Id.* at 515. That point disposes of respondents' assertions (which are decidedly overstated in any event) that compliance with

the DPPA will impose onerous administrative burdens on state DMV personnel.[6]

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[6] Respondents stress the supposedly "complicated" nature of the exceptions to the general bar on disclosure in the DPPA (Resp. Br. 5), the "laborious" process of determining whether any particular request falls within one of the exceptions (*id.* at 14), and the "considerable training" of state personnel that will be needed to make them familiar with the substantive requirements of the Act (*id.* at 7 n.8). Those complaints about the burden of coming into compliance with the Act are much exaggerated. The Act does not require that a state DMV adopt any particular mechanism for ensuring that its disclosures of personal information are consistent with the DPPA. Most of the steps necessary for compliance could probably be satisfied by the initial development of a form for use by requesters. Moreover, the DPPA permits the Attorney General to impose civil penalties on a state DMV only when the DMV has a *policy or practice* of substantial noncompliance with the Act, 18 U.S.C. 2723(b); it provides for criminal punishment only when an individual *knowingly* violates the Act's restrictions, 18 U.S.C. 2723(a); and it allows recovery under a civil damages provision only when an individual *knowingly* discloses information for a purpose not permitted under the Act, 18 U.S.C. 2724(a). Thus, despite respondents' protestations that the DPPA places state officials in peril (Resp. Br. 6-7), the DPPA does not impose strict civil or criminal liability on state officials, and sanctions are not available for mere errors in judgment as to whether particular requests for information are permissible under the Act.

Respondents have therefore fallen far short of showing that the Act's supposed burden poses any danger to the residual sovereignty of the States protected by the constitutional structure of federalism. "Even the more expansive conception of the Tenth Amendment espoused in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), recognized that only congressional action that 'operate[s] to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions,' runs afoul of the authority granted by Congress." *Baker*, 485 U.S. at 529 (Rehnquist, C.J., concurring in the judgment). Not only does the DPPA not pose any threat to the States' ability to structure their integral operations; it specifically protects the States' interests in regulating driving and in determining when motor vehicle information should be used for legitimate governmental purposes, as we have observed (Gov't Br. 32-33). See also p. 17, *infra* (noting that American

In *Baker*, the Court also stressed that the statute upheld in that case, which imposed a prohibition on state conduct (the use of bearer bonds), "regulate[d] state activities"; it did not "seek to control or influence the manner in which the States regulate private parties." 485 U.S. at 514. The same is true here. The DPPA regulates the state activity of dissemination of information; it does not require the States to exercise their regulatory power over private persons. The States, for example, have no obligation to pursue remedies against any requester who improperly obtains or uses information from motor vehicle records.[7]

c. Respondents further err in arguing (Resp. Br. 20) that *New York* "explicitly recognized that Congress cannot impose duties on the States regardless of whether the duties imposed are mandatory or prohibitory in nature." That assertion is an incorrect statement of the law. *New York* did not hold that Congress may impose no "duties" on state entities; such a holding could not be squared with many of the Court's Tenth Amendment decisions, including *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528

Association of Motor Vehicle Administrators supported passage of the DPPA).

[7] Respondents argue (Resp. Br. 23) that the Court engaged in a "balancing" analysis in *Baker*, and that no such balancing of federal and state interests is appropriate in this case. We agree that balancing is not appropriate in this case, but we do not agree that *Baker* applied a balancing analysis. The Court concluded in *Baker* that the Tenth Amendment is not violated by the application of federal regulation to state activity, even though the States may, in response to that federal regulation, deem it necessary or convenient to change their legislation or administrative practices. See 485 U.S. at 515. That holding did not depend on a court's possible evaluation of the relative weights of the state and federal interests. Nor does *Baker* suggest that a court should make its own evaluation of the onerousness of the administrative burden that Congress has imposed on a state entity, to determine whether the federal regulation is consistent with constitutional principles of federalism.

(1985), which reaffirmed that Congress may impose duties on state entities—in that case, the duties to adhere to maxmium-hours legislation and to pay overtime pay when required. The Court did state in *New York*, as respondents observe (Resp. Br. 20), that, "even where Congress has the authority * * * to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts." 505 U.S. at 166. The DPPA, however, does not suffer from that deficiency. The DPPA does not require state DMVs to require or prohibit anyone outside the agency to do anything.

It is particularly difficult to sustain a contention that a federal statute impermissibly commandeers state officials when (as with the DPPA) the statute under challenge imposes no affirmative obligations at all.[8] If a federal statute

[8] Respondents and amici NCSL *et al.* incorrectly argue (Resp. Br. 7; NCSL Br. 15-16) that the DPPA affirmatively requires state DMVs to make disclosures to the federal government in certain circumstances. The distinction between a permissible requirement of compliance with federal standards and impermissible commandeering does not generally turn on whether the regulation at issue imposes a restriction or an affirmative obligation on state entities. But in any event, as we explain in our opening brief (at 28 n.12), the DPPA does not create any new disclosure requirements beyond those otherwise existing under federal law. Although the DPPA provides that personal information from motor vehicle records "shall" be disclosed to carry out the purposes of other specified federal statutes, see 18 U.S.C. 2721(b) (1994 & Supp. III 1997), that provision only makes clear that the DPPA does not relieve state agencies of reporting requirements that the other federal statutes might impose. See also 1994 WL 212696 (Feb. 4, 1994) (statement of Marshall Rickert, American Association of Motor Vehicle Administrators) (urging Congress to amend the Senate version of the bill to clarify that it would not "create conflicts with other current federal privacy and disclosure requirements as they related to motor vehicle and driver records"). The DPPA therefore imposes no reporting obligations independent of those in the underlying statutes, and any consideration of the validity of such reporting obligations should await a case in which those underlying statutes are directly placed in issue. That is especially so since the affirmative reporting

"commandeers" state officials, one would assume that it does so in order that they carry out some affirmative act, such as adopting a regulatory program governing radioactive waste (as in *New York*) or performing background checks to determine the legality under federal law of proposed handgun transfers (as in *Printz*). By contrast, when a federal statute simply prevents state officials or agencies from taking action, it is difficult to see how they have been commandeered.[9]

requirements have not been the focus of contention in this case in the lower courts. Respondents' complaint alleged that the DPPA "commands the states * * * not to disclose state motor vehicle and driver's license records except as provided by [the] Federal statute," J.A. 11; it did not assert as a specific basis of invalidity that the DPPA requires the States to disclose information. Nor did respondents challenge the DPPA on that basis in the court of appeals. This case therefore presents no occasion for the Court to consider the validity of federal disclosure requirements applicable to state entities. Cf. *Printz*, 521 U.S. at 918 (distinguishing that situation); *id.* at 936 (O'Connor, J., concurring) (same).

[9] Similarly, as we have noted (Gov't Br. 29-30), it is indisputable that Congress may preempt state law to *bar* a state agency from taking regulatory action, even if the anti-commandeering principle would prevent Congress from *requiring* the States to regulate. Respondents and their amici object that this case does not involve preemption. See Resp. Br. 28; NCSL Br. 16; Ala. Br. 29. We have not argued that the DPPA is a preemption provision; rather, we have pointed out that preemption provides a useful analogy because several of respondents' arguments (such as the argument that Congress cannot legislate with respect to the States unless it also imposes similar regulation on private entities) cannot be squared with this Court's preemption jurisprudence. See Gov't Br. 38-39. Amici Alabama *et al.* also argue (Ala. Br. 29) that, even though some federal preemption clauses may be phrased in terms of precluding state legislatures and administrative bodies from taking action, preemption actually has relevance only for the state judiciary, and has little or no real effect on the operation of state legislatures and administrators. That understanding of preemption is incorrect. Congress has enacted several provisions that preempt even legislative bodies from taking action in a field governed by federal law, see, *e.g.*, 49 U.S.C. 41713(b)(1), and the application to the

d. Respondents also contend (Resp. Br. 14-17) that the DPPA is invalid because it blurs lines of "political accountability" for decisions by state DMVs whether to release information that is covered by the Act. Respondents misapprehend the relevance of the issue of accountability. The Court has made clear that concerns about accountability underlie the prohibition against commandeering state and local governments into regulating private conduct on behalf of the federal government. See *Printz*, 521 U.S. at 926-933; *New York*, 505 U.S. at 182-183. As we have shown, however (pp. 4-7, *supra*), the DPPA results in no such commandeering, and it therefore does not implicate those accountability considerations.

Respondents would expand the inquiry into "accountability" to condemn federal statutes that restrict state activity whether or not they commandeer the State into regulating private conduct. That notion finds no support in this Court's decisions. The Court has never held that political accountability is impermissibly blurred merely because a state or local official's options in carrying out a state program are constrained by federal law. To the contrary, it is frequently the case that state decisionmakers must take account of the substantive requirements of federal law in choosing among various alternatives, yet that fact presents no constitutional difficulty. For example, in *Fry* v. *United States*, 421 U.S. 542 (1975), the Court upheld the application to state employment of federal wage and salary controls, which limited annual

legislative bodies of the preemption clause is hardly surplusage, as amici suggest. See *Golden State Transit Corp.* v. *City of Los Angeles*, 493 U.S. 103 (1989) (*Machinists* preemption directly prohibits city officials from taking particular actions with respect to private employers, thereby conferring a right that employers may vindicate in damages actions under 42 U.S.C. 1983); 493 U.S. at 119 (Kennedy, J., dissenting) (rejecting damages remedy but agreeing that "plaintiffs may vindicate *Machinists* preemption claims by seeking declaratory and equitable relief in the federal district courts").

salary increases for covered employees. If a state employee had asked his employer for a salary increase exceeding the permissible limit under federal law, the state employer would have had to consider, and comply with, the federal rule restricting salary increases. Under respondents' reasoning, however, *Fry* could not have been decided correctly, because a state agency could have been placed in the position of denying a requested wage increase to a state employee, even though it was federal law that prohibited the state agency from increasing salaries above a certain limit.[10]

3. *Congress's Power Is Not Limited To Generally Applicable Laws.*

As we show in our opening brief (at 34-48), the central holding of the court of appeals, that "Congress may *only* subject state governments to generally applicable laws," Pet. App. 15a (emphasis added; internal quotation marks omitted), is inconsistent with the Constitution's plenary

[10] A state agency may also find that its regulatory alternatives are constrained by a preemption provision in a federal statute. For example, the Airline Deregulation Act of 1978, Pub. L. No. 95-504, § 4(a), 92 Stat. 1708, precludes the States from enacting or enforcing any law related to any price, route, or service of an air carrier. 49 U.S.C. 41713(b)(1). Under the Airline Deregulation Act, a state consumer-protection agency may not take regulatory action against an airline for overcharging passengers, even if passengers request the state agency to take such action. See *Morales* v. *Trans World Airlines*, 504 U.S. 374 (1992). But even though the state agency must decline the passengers' request for regulatory action against the airline, and even though the federal government is ultimately responsible for the fact that the state agency is prevented from doing so, there is no impermissible "blurring" of political accountability in such a situation. Rather, a constitutionally valid preemption provision is simply given its proper effect under the Supremacy Clause, U.S. Const. Art. VI, Cl. 2. Similarly, in *Golden State Transit Corp.*, *supra*, the City of Los Angeles was held liable under 42 U.S.C. 1983 for the failure of city officials to respect limitations imposed by federal law on their licensing activities, with no suggestion of any constitutionally significant blurring of accountability as between the city and federal authorities.

grant of "legislative Power" to Congress, U.S. Const. Art. I, which necessarily includes the authority possessed by legislative bodies generally to tailor their laws with respect to the particular problems they identify (see Gov't Br. 39-45). In addition, the court of appeals' rigid rule finds no support in the constitutional structure of federalism (*id.* at 45-48) or in precedent or logic (*id.* at 34-39). Respondents and their amici make no attempt to answer our arguments based on the Constitution's text and structure, and the efforts they do make to defend the court of appeals' ruling are unavailing.

a. Respondents argue (Resp. Br. 25-26) that generally applicable laws do not present the danger of blurring of political accountability present in *New York* and *Printz* because, "[w]hen the States are subjected to statutes which apply generally, such statutes apply so broadly that they are unlikely to be mistaken for governmental policy choices by the States." We agree that generally applicable laws do not blur political accountability, but the same point is also true of statutes like the DPPA that directly regulate only state activity directly and do not commandeer state officers into enforcing federal law against private parties. As Judge Phillips observed in dissent below, generally applicable laws are constitutionally permissible because "they directly regulate[] state activities rather than using the States as implements of regulation of third parties." Pet. App. 32a (internal quotation marks omitted). It is only in the latter circumstance that an impermissible blurring of political accountability occurs under the Court's cases. See *New York*, 505 U.S. at 168 ("By contrast, where the Federal Government *compels [the] States to regulate*, the accountability of both state and federal officials is diminished.") (emphasis added); pp. 6-7, *supra*. When the federal government itself directly regulates the activities of state entities in commerce, responsibility for the regulation clearly lies with the federal government.

b. Amici Alabama *et al.* urge the Court to reconceptualize its entire Tenth Amendment jurisprudence. See Ala. Br. 9-10. They argue that the Court should abandon its emphasis in *New York* and *Printz* on impermissible "commandeering" of state and local governments, and instead should distinguish principally between laws of general applicability that include States among the regulated entities, and laws that do not apply to private parties and States in the same way. That emphasis on general applicability is appropriate, amici argue, because laws that "target" States for a "unique burden" should be held invalid under a "process-oriented" approach to the Tenth Amendment that examines whether Congress has "singled out" the States. *Ibid.*

There is no support in this Court's jurisprudence for the proposition that laws that apply only to state entities, or apply to state entities differently than they apply to private entities, are invalid because they target the States as politically powerless entities. Amici seek to enlist *Garcia* and *Baker* for their position (see Ala. Br. 4-16), but their argument turns those decisions upside down. In *Garcia*, the Court emphasized that the States retain considerable influence in the federal legislative structure established by the Constitution, especially through their representation in the Senate. The Court explained that "the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself," and that "the composition of the Federal Government was designed in large part to protect the States from overreaching by Congress." 469 U.S. at 550-551.[11] The

[11] The Court observed in *Garcia* that "Madison placed particular reliance on the equal representation of the States in the Senate, which he saw as 'at once a constitutional recognition of the portion of sovereignty remaining in the individual States, and an instrument for preserving that residuary sovereignty.'" 469 U.S. at 551-552 (quoting The Federalist No. 62, at 408 (James Madison) (B. Wright ed. 1961)). The Court concluded:

Court in *Garcia* therefore abandoned the framework of *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), and instead emphasized the workings of the political process to safeguard state interests in the federal system. "State sovereign interests * * * are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power." *Garcia*, 469 U.S. at 552.

To be sure, the Court observed in *Baker* that "*Garcia* left open the possibility that some *extraordinary defects* in the national political process might render congressional regulation of state activities invalid under the Tenth Amendment." 485 U.S. at 512 (emphasis added). Neither *Garcia* nor *Baker* suggested, however, that the mere fact that a federal regulatory statute might apply only to a particular kind of state activity, or might apply to state activities differently than similar regulation applied to private activities, would be evidence of an "extraordinary defect[]" in the federal legislative process. When the Court in *Baker* adverted to "extraordinary defects," it was referring to a situation in which a *particular* State might have been deprived of its opportunity to participate in the process of framing federal legislation. Thus, the Court in *Baker* noted that "South Carolina ha[d] not even alleged that it was deprived of any right to participate in the national political process or that it was singled out in a way that left it politically isolated and powerless." *Id.* at 513.

It strains credulity to suggest that a federal statute's applicability to *all* States of the Union demonstrates that the States have been reduced to a position of political powerlessness. As the Court pointed out in *Garcia*, the States have

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"In short, the Framers chose to rely on a federal system in which special restraints on federal power over the States inhered principally in the workings of the National Government itself, rather than in discrete limitations on the objects of federal authority." 469 U.S. at 552.

substantial influence in the federal government. If South Carolina, or any of the other 49 States of the Union, perceived that the proposal to enact the DPPA threatened to impinge on state prerogatives, its officials were free to make their objections known to the Congress. And if many States had perceived that the DPPA was adverse to their legitimate interests, it is doubtful that the DPPA would have been enacted. But far from impairing the States' governmental interests, the DPPA is particularly respectful of those interests; as we have explained (Gov't Br. 32-33), the DPPA poses no obstacle to the use of personal information in DMV records by state agencies. See 18 U.S.C. 2721(b)(1) and (4). It is therefore unsurprising that a representative of the American Association of Motor Vehicle Administrators appeared before Congress in support of the DPPA. See 1994 WL 212696 (Feb. 4, 1994) (statement of Marshall Rickert, Motor Vehicle Administrator for the State of Maryland).

Amici's attempt to analogize this case to one in which the government targets a particular member of the press or a minority religion for adverse treatment (see Ala. Br. 13-14) is therefore unpersuasive.[12] Similarly, in light of the Court's emphasis in *Garcia* on the States' substantial influence in the federal system, the 50 States of the Union cannot reasonably be likened to a discrete and insular minority that lacks politi-

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[12] Even on its own terms, amici's analogy to the Court's First Amendment cases fails. In *Leathers* v. *Medlock*, 499 U.S. 439 (1991), the Court explained that "differential taxation of speakers, even members of the press, does not implicate the First Amendment unless the tax is directed at, or presents the danger of suppressing, *particular* ideas." *Id.* at 453 (emphasis added); see also *id.* at 446 (observing that "selective taxation of the press through the narrow targeting of individual members offends the First Amendment"). The DPPA, however, does not target or single out any *particular* State for unequal treatment. For the same reason, the DPPA is unlike the ordinance invalidated in *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520 (1993), which targeted a *particular* unpopular minority religion for hostile treatment.

cal influence. Cf. *Baker*, 485 U.S. at 513 (citing *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938), when referring to the possibility of an extraordinary defect in the national political structure leaving a particular State isolated and powerless). The 50 States of the Union are not a vulnerable political constituency that needs judicial protection against discrimination.

Amici's argument is particularly implausible as applied to the DPPA, for the DPPA is one of several federal statutes that regulate the disclosure of personal information by private and governmental entities. The statute books "teem with laws regulating the disclosure of information from databases." *Travis* v. *Reno*, 163 F.3d 1000, 1005 (7th Cir. 1998), petition for cert. pending, No. 98-1811; see also Gov't Br. 20-21, 39-41. Many of these other federal statutes, applicable to private entities, "adopt record-keeping and information-disclosure criteria at least as complex, and impose a burden at least as great, as the [DPPA]." 163 F.3d at 1005.[13] Thus, even though the other federal statutes do not apply to private databases in exactly the same way that the DPPA applies to the records of state agencies, nonetheless the States have not been "singled out" for burdensome treatment.

Amici Alabama *et al.* contend (Ala. Br. 14) that Congress may not restrict disclosures from DMV records unless it places *identical* restrictions on the disclosure of the same information by all private entities. Congress, however, permissibly concluded that the dangers posed by the dissemination of motor vehicle records differ from the dangers posed by the dissemination of video store and credit bureau records, and tailored its legislative responses accordingly. Disclosures of personal information in DMV records

[13] Indeed, Wisconsin—which has joined Alabama's amicus brief before this Court—"disclaimed any contention that Wisconsin's burden exceeds the travail of banks or other entities regulated by statutory equivalents" to the DPPA. *Travis*, 163 F.3d at 1005.

are particularly problematic because forgoing a driver's license is not a realistic option for most individuals.[14] Motor vehicle records also raise unique privacy concerns because the license plate number, which must be displayed to the public, can be made the key to the driver's identity and home address. In effect, absent the DPPA, every vehicle owner would be required to provide every stranger with the key to his personal information. As Representative Moran, one of the DPPA's sponsors, explained: "The key difference between DMV records and other public records comes from the license plate, through which every vehicle on the public highways can be linked to a specific individual." 140 Cong. Rec. H2523 (daily ed. Apr. 20, 1994).

In addition, as the American Association of Motor Vehicle Administrators informed Congress, "driver and motor vehicle records maintained by one state can be accessed from practically anywhere using only a computer modem." 1994 WL 212696 (Feb. 4, 1994). Other records systems (both private and governmental), such as personnel files and medical records, are not necessarily so readily accessible to the public. Thus, even if information similar to that held in DMV records, such as an individual's name, home address, and social security number, may be kept in other records systems, the danger of disclosure from those records systems is not necessarily so great as the danger of disclosure from DMV records. As Rep. Moran observed, "[a]nyone with access to data linking license plates with vehicle ownership has the ability to ascertain the name and address of the

[14] See 1994 WL 212834 (Feb. 3, 1994) (statement of Prof. Mary J. Culnan, Georgetown University) ("Few people can survive without a driver[']s license or an automobile, and a condition of having either is to register with the state. * * * This is in direct contrast to most of the other mailing lists based on private sector data, such as a list of subscribers to a particular magazine."); *Wooley* v. *Maynard*, 430 U.S. 705, 715 (1977) (driving an automobile is "a virtual necessity for most Americans").

person who owns that vehicle. Other public records are not vulnerable to abuse in the same way." 140 Cong. Rec. H2523 (daily ed. Apr. 20, 1994).

Congress therefore had a legitimate basis for addressing in one tailored statute the privacy concerns raised by dissemination of personal information from DMV records, rather than attempting to address all privacy concerns raised by all disclosures of information from all private and public databases, as Alabama apparently would require that it do. Although respondents and their amici disagree with that legislative judgment, "nothing in *Garcia* or the Tenth Amendment authorizes courts to second-guess the substantive basis for congressional legislation." *Baker*, 485 U.S. at 513. There is no reason for the Court to depart from its usual practice of giving Congress wide latitude in setting its legislative priorities and selecting its legislative means. See *Williamson* v. *Lee Optical Inc.*, 348 U.S. 483, 489 (1955). To the contrary, the special protections that the States enjoy in the political process make such deference particularly appropriate in this context.

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For the foregoing reasons, and for those set forth in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

OCTOBER 1999

(17)

Supreme Court, U.S.
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No. 98-1464

In the Supreme Court of the United States

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, ET AL., PETITIONERS

v.

CHARLIE CONDON, ATTORNEY GENERAL FOR THE STATE OF SOUTH CAROLINA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE PETITIONERS

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The Court granted certiorari in this case (in which oral argument is scheduled for November 10, 1999) to determine whether the Driver's Privacy Protection Act of 1994 (DPPA), 18 U.S.C. 2721-2725 (1994 & Supp. III 1997), which was enacted as an exercise of Congress's authority under the Commerce Clause, U.S. Const. Art. I, § 8, Cl. 3, contravenes the constitutional principles of federalism embodied in the Tenth Amendment. Since the briefs on the merits were filed, Congress has enacted a law that both strengthens the substantive restrictions on disclosure of information from motor vehicle records and changes the practical significance of the legal issue before the Court.

1. On October 9, 1999, the President signed into law Public Law No. 106-69, 113 Stat. 986, the appropriations Act for the Department of Transportation and related agencies for Fiscal Year 2000 (DOT Act). Section 350 of the DOT Act amends and otherwise affects the DPPA's substantive restrictions on disclosure of personal information from state department of motor vehicle (DMV) records in several important respects.[1]

a. Section 350(a) of the DOT Act provides that no recipient of funds made available in the DOT Act shall disseminate

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[1] We have reproduced in an appendix to this brief both Section 350 itself and the sparse legislative history of Section 350 that we have identified. That legislative history includes (a) the original version of the funding provision passed by the Senate on September 16, 1999 (S. 1143, 106th Cong., 1st Sess. § 339 (1999), passed as a substitute amendment for H.R. 2084, see 145 Cong. Rec. S10,981 (daily ed. Sept. 16, 1999)); (b) the relevant excerpt from the Senate Report explaining the Senate-passed version (S. Rep. No. 55, 106th Cong., 1st Sess. 166 (1999)); (c) the relevant portion of the Conference Report explaining Section 350 as finally passed by both Houses (H.R. Conf. Rep. No. 355, 106th Cong., 1st Sess. 121 (1999)); and (d) the floor statement of Senator Shelby explaining Section 350 (145 Cong. Rec. S11,863 (daily ed. Oct. 4, 1999)). In addition, we have lodged with the Clerk a copy of the enrolled bill, H.R. 2084, 106th Cong., 1st Sess. (1999), that was signed by the President and became Public Law No. 106-69. Section 350 is found at pages 40-41 of the lodged copy of the bill.

certain driver's license "personal information," as defined in 18 U.S.C. 2725(3),[2] "except as provided by" Section 350(b) of the DOT Act. (Section 350(b), as explained below (p. 4, *infra*), specifically addresses the disclosure of photographs, social security numbers, and medical and disability information from motor vehicle records.) Section 350(a) further provides that no recipient of funds made available in the DOT Act shall disseminate "motor vehicle records," as defined in 18 U.S.C. 2725(1), for any use not permitted under 18 U.S.C. 2721, which contains the DPPA's basic restrictions on disclosure.[3]

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[2] Section 2725(3) provides that "'personal information' means information that identifies an individual, including an individual's photograph, social security number, driver identification number, name, address (but not the 5-digit zip code), telephone number, and medical or disability information, but does not include information on vehicular accidents, driving violations, and driver's status." The phrase "[d]river's license personal information" used in Section 350(a) of the DOT Act presumably refers to any of the quoted information that appears on (or is obtained from a motor vehicle record pertaining to) a driver's license (*i.e.*, an operator's permit, see 18 U.S.C. 2725(1)).

[3] Section 350(a) of the DOT Act states in full: "No recipient of funds made available in this Act shall disseminate driver's license personal information as defined in 18 U.S.C. 2725(3) except as provided in subsection (b) of this section or motor vehicle records as defined in 18 U.S.C. 2725(1) for any use not permitted under 18 U.S.C. 2721." Section 350(a) distinguishes between "driver's license personal information" (referring to personal information specifically connected in state DMV records to an individual's operator's permit) and "motor vehicle records" (evidently referring more broadly to personal information found in state DMV records, including title and registration records). The DPPA defines "motor vehicle record" to mean "any record that pertains to a motor vehicle operator's permit, motor vehicle title, motor vehicle registration, or identification card issued by a department of motor vehicles." 18 U.S.C. 2725(1). It is not clear whether the restriction on dissemination of "motor vehicle records" in Section 350(a) of the DOT Act covers any material found in such records in addition to "personal information," as defined in 18 U.S.C. 2725(3), that might be found in such records, but to the extent that it might, it is doubtful that the restriction adds anything significant to

One evident purpose of Section 350(a) is to tie the DPPA's substantive restrictions on disclosure of personal information in state DMV records to a State's receipt of federal transportation funds. For example, a State that accepts funds for federal-aid highways under 23 U.S.C. 105, for which funds are appropriated in the DOT Act (see enrolled bill (at 11) lodged with the Clerk, note 1, *supra*), may not disclose information from its motor vehicle records for a purpose not permitted by the DPPA. Congress has therefore enacted the substantive restrictions on disclosure in the DPPA under the Spending Clause of the Constitution, U.S. Const. Art. I, § 8, Cl. 1, as well as the Commerce Clause. See generally *South Dakota* v. *Dole*, 483 U.S. 203 (1987).

At the same time, however, Congress did not connect the DPPA exclusively to federal spending or make it exclusively an exercise of its Spending Clause power. Congress did not, for example, repeal the DPPA and reenact its substantive provisions in the appropriations Act. Rather, the DPPA (including its substantive restrictions on disclosure and its criminal and civil penalty and damages provisions) remains a

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the restrictions in the DPPA itself on disclosure of personal information in motor vehicle records.

In addition, although the matter is not entirely clear, the phrase "for any use not permitted under 18 U.S.C. 2721" in Section 350(a) appears to modify all the preceding language of Section 350(a). Therefore, although Section 350(a) states that no recipient of funds "shall disseminate driver's license personal information * * * except as provided in subsection (b)" (subsection (b) refers to photographs, social security numbers, and medical and disability information), we do not read subsection (a) of Section 350 to prohibit dissemination of "driver's license personal information" *not* covered by subsection (b) (such as names, addresses, and telephone numbers in driver's license records) if the DPPA itself would permit such disclosure. That reading is consistent with the Conference Report, which expressly states that "[i]t is the conferees' intent that personal information such as name, address, and telephone number, can still be distributed as specified by the [DPPA] and this Act." H.R. Conf. Rep. No. 355, *supra*, at 121.

part of Title 18 of the United States Code. If, therefore, Congress were to fail to reenact Section 350(a) in next year's DOT appropriations Act, the DPPA would remain in force.

b. In addition to linking the substantive restrictions in the DPPA to the receipt of federal transportation funds, Section 350(b) of the DOT Act establishes an additional restriction specifically on disclosure of certain personal information from DMV records pertaining to driver's licenses. Specifically, Section 350(b) provides that no recipient of funds under the DOT Act may disseminate from a motor vehicle record any driver's license photograph, social security number, or medical or disability information, without the express consent of the person to whom that information pertains. Exceptions are made for certain of the disclosures that are permitted under the DPPA, such as disclosures for use by any government agency (see 18 U.S.C. 2721(b)(1)). The new restriction added by Section 350(b) exists in the appropriations Act only, and is not made an amendment to the DPPA in Title 18. Therefore, if Congress were to fail to reenact this restriction for the next fiscal year, it presumably would expire.

c. By contrast, Section 350(c) of the DOT Act amends one of the substantive restrictions on disclosure in the DPPA itself. Specifically, it amends 18 U.S.C. 2721(b)(11) to provide that a DMV may disclose personal information from a motor vehicle record for "any other use" (that is, any use not expressly covered by 18 U.S.C. 2721(b)(1)-(10) (1994 & Supp. III 1997)) only if the State has obtained "the express consent of the person to whom such personal information pertains." Previously, under the DPPA, a state DMV could disclose information about an individual for "any other use" only if the DMV had afforded the individual the opportunity to prohibit disclosures of personal information, and the individual had declined that opportunity. Section 350(c) thus changes 18 U.S.C. 2721(b)(11) from an "opt out" provision to an "opt in" provision; individuals must affirmatively permit

disclosure of information about them for "any other use" for such disclosure to be permissible. Because this amendment (as well as the similar one made by Section 350(d), discussed below) is to the DPPA itself, it would remain in effect even if Congress were to fail to reenact Section 350 or a similar provision for Fiscal Year 2001.

d. Section 350(d) makes a similar amendment to 18 U.S.C. 2721(b)(12), which governs the disclosure of information for use in surveys, marketing, and solicitations. Previously, disclosure for such purposes was permissible if the DMV had afforded the individual the opportunity to prohibit it, but the individual had declined to do so. After the amendment, a DMV may disclose information about an individual for such purposes only if he or she affirmatively consents.

e. Section 350(e) provides that a State may not condition the issuance of a "motor vehicle record" (as defined in the DPPA, 18 U.S.C. 2725(1)), such as a driver's license, on an individual's consent to the disclosures regulated by Section 350(b) (involving driver's license photographs, social security numbers, and medical and disability information) and Section 350(c) (involving disclosures of personal information for "any other use"). This prohibition was not made part of the DPPA in Title 18, but it also is not expressly limited to recipients of funds under the DOT Act. It therefore is unclear whether it will expire if Congress fails to renew it for the next fiscal year.[4]

f. Section 350(f) provides that the Secretary of Transportation may not withhold funds provided under the DOT Act if a State does not comply with the restrictions in Section 350. Thus, although Section 350 does tie restrictions on disclosure to the receipt of federal funds, it does not permit

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[4] One of the provisions to which Section 350(e) is connected, Section 350(b), is part of the appropriations Act only and will expire at the end of the fiscal year unless renewed by Congress, but the other provision to which Section 350(e) is connected, Section 350(c), effects a permanent amendment to the DPPA.

termination of funding as a sanction for noncompliance with those restrictions. The United States presumably could, however, obtain injunctive relief against a State that did not comply with the condition on the receipt of funds.[5]

g. Section 350(g) specifies various effective dates for the provisions of Section 350:

(i) Section 350(g)(1) provides that, in general, the connection between the restrictions on disclosure in the DPPA and the receipt of federal funds made available in the DOT Act, as provided in Section 350(a), is made immediately effective. Similarly, the prohibition against conditioning the issuance of a driver's license or other motor vehicle record on an individual's consent to certain forms of disclosure, as provided in Section 350(e), is made immediately effective. Temporary exceptions are made, however, for the States of Wisconsin, Oklahoma, and South Carolina, three of the four States that have challenges to the constitutionality of the DPPA currently pending before this Court.[6] Those three States must comply with the restrictions in Section 350(a) and (e) within 90 days after this Court issues "a final decision on Reno vs. Condon," *i.e.*, this case.[7]

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[5] The DPPA itself also provides that noncompliance with its substantive restrictions may be addressed through civil and criminal penalties and civil damages actions. See 18 U.S.C. 2723, 2724.

[6] In addition to this case, which involves South Carolina's challenge to the DPPA, see *Oklahoma Dep't of Pub. Safety* v. *United States*, petition for cert. pending, No. 98-1760, and *Wisconsin Dep't of Transp.* v. *Reno*, petition for cert. pending, No. 98-1818. In this case, the district court held the DPPA unconstitutional and enjoined its enforcement against South Carolina, Pet. App. 72a, and the court of appeals affirmed. In the Oklahoma and Wisconsin cases, the district courts likewise held the DPPA unconstitutional and enjoined further enforcement of the Act against those States; the courts of appeals reversed those decisions, but the government did not object to a stay of the courts of appeals' mandates in those cases, and so the injunctions issued by the district courts in the Oklahoma and Wisconsin cases remain in force.

[7] Alabama has also challenged the constitutionality of the DPPA. The court of appeals ruled in favor of Alabama and held the DPPA unconstitutional; the government filed a petition for a writ of certiorari but did not seek a stay of the court of appeals' mandate. See *Reno* v. *Pryor*, petition for cert. pending, No. 99-61. Section 350(g) does not, however, extend the effective date of the restrictions in Section 350(a) and (e) for Alabama.

(ii) Section 350(g)(2) establishes a general effective date of June 1, 2000, for the provisions of Section 350(b) (prohibiting, with certain exceptions, the unconsented dissemination of driver's license photographs, social security numbers, and medical and disability information), Section 350(c) (amending the DPPA's restrictions on disclosure of personal information for "any other use" to require affirmative consent for disclosure), and Section 350(d) (similarly amending the DPPA's restrictions on disclosure for surveys, marketing, and solicitations to require affirmative consent for disclosure). That delayed effective date was evidently put in place to allow the state DMVs time to develop new procedures for obtaining an individual's express consent to these disclosures. For six States, Section 350(g)(2) establishes an effective date of 90 days after the next convening of the state legislature, perhaps reflecting a congressional judgment that those States might deem it necessary to amend their state codes to establish the necessary procedure for obtaining an individual's consent to disclosure. A special effective date is again established for Wisconsin, South Carolina, and Oklahoma. Under Section 350(g)(2), those States must comply with the provisions of Section 350(b), (c) and (d) within 90 days of "a final decision on Reno vs. Condon" by this Court, or within 90 days after the next convening of the state legislature, if it is not in session when this Court issues its final decision in this case.

2. The enactment of Section 350 of the DOT Act alters the practical significance of the Tenth Amendment challenges that have been made to the DPPA. Upon the taking effect of Section 350(a), the DPPA's substantive restrictions on disclosure of personal information from DMV records are no longer based only on Congress's Commerce Clause power,

but are also based on Congress's extensive power under the Spending Clause. This Court has made clear that Congress may, under the Spending Clause, permissibly place conditions on the receipt of federal funds, even if those conditions would otherwise be inconsistent with the Tenth Amendment. See *New York* v. *United States*, 505 U.S. 144, 171-173 (1992); *South Dakota* v. *Dole*, 483 U.S. at 210; *Oklahoma* v. *United States Civil Serv. Comm'n*, 330 U.S. 127, 143-144 (1947).

Nevertheless, respondents' existing constitutional challenge to the DPPA's restrictions is not moot in the present posture of this case. Congress has expressly delayed the effective date of the application of Section 350 of the DOT Act to South Carolina (and to Wisconsin and Oklahoma) until after this Court's final decision in this case, perhaps in deference to this Court's decisional process. In addition, Congress has not repealed the DPPA, nor has Congress based the restrictions in the DPPA solely on its Spending Clause power. At this juncture, therefore, there remains a live controversy in this case (as well as in the Wisconsin and Oklahoma cases, see note 6, *supra*) and a circuit conflict as to whether the DPPA, as legislation under the Commerce Clause alone, contravenes the Tenth Amendment, for the DPPA's restrictions on disclosure as applied to South Carolina, Wisconsin, and Oklahoma are not *currently* also based on the Spending Clause. Moreover, this case has been fully briefed, and if the Court proceeds to hear this case in its present posture, the issues relevant to respondents' Tenth Amendment challenge to the DPPA do not require supplemental briefing.

At the same time, even if this Court were to issue a final decision on the merits adverse to the government on the legal issue as currently framed before this Court, holding that the DPPA's restrictions on disclosure cannot be sustained under the Commerce Clause alone, Section 350(g)(1) of the DOT Act provides that, within 90 days after that final decision, South Carolina must comply with the very same restrictions on disclosure as a condition to its receipt of federal transportation funds. We have no reason to suppose that South Carolina would forgo the receipt of federal funds made available under the DOT Act in order to avoid that condition. Thus, as a result of Congress's enactment of Section 350, the question whether the DPPA's substantive restrictions on disclosure may be based on the Commerce Clause alone has something of an academic tenor at the present time.

In light of the foregoing considerations, although respondents' Tenth Amendment challenge to the DPPA as Commerce Clause legislation alone is not moot, the Court may wish to consider vacating the judgment of the court of appeals and remanding the case to that court for further proceedings in light of Section 350 of the DOT Act. Such a disposition by this Court would constitute "a final decision on Reno vs. Condon by the United States Supreme Court" within the meaning of Section 350(g) of the DOT Act, and therefore would make applicable to South Carolina (and Wisconsin and Oklahoma), within 90 days of that "final decision," the basic provision of Section 350(a) that ties the restrictions on disclosure in the DPPA to the receipt of federal transportation funds. If one of those States should then decide to challenge the DPPA's restrictions on disclosure even under the Spending Clause, the lower court having jurisdiction over the particular case would consider that constitutional challenge in the first instance, and if further review were sought, this Court could decide at that time whether review of the Spending Clause issue would be warranted. That disposition would be consistent with this Court's often-expressed policy of restraint with respect to reaching and deciding constitutional issues. See *Spector Motor Serv., Inc.*

v. *McLaughlin*, 323 U.S. 101, 105 (1944); *Burton* v. *United States*, 196 U.S. 283, 295 (1905).[8]

* * * * *

For the foregoing reasons, respondents' Tenth Amendment challenge to the DPPA as Commerce Clause legislation alone is not moot, and is fully briefed and ready for argument. The Court may wish, however, to consider vacating the judgment of the court of appeals and remanding the case to that court for further proceedings in light of Section 350 of Public Law No. 106-69.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

OCTOBER 1999

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[8] An order vacating the decision below and remanding the case to the court of appeals, as discussed herein, would be preferable to a dismissal of the writ of certiorari as improvidently granted. If this Court were to dismiss the writ, then the erroneous decision of the Fourth Circuit invalidating the DPPA would remain in place, even though the State of South Carolina would almost immediately become subject to the restrictions of the DPPA as a consequence of its receipt of federal transportation funds. In addition, as we have explained (p. 6, *supra*), under Section 350(g)(1), Section 350(a) will become applicable to Oklahoma and Wisconsin as well 90 days after the Court's final decision in this case, and Section 350(a) is already applicable to Alabama. Accordingly, if the Court vacates the judgment of the court of appeals in this case and remands for further proceedings in light of Section 350 of the DOT Act, the Court should take similar action with respect to the other pending petitions, involving those States' challenges to the DPPA. See *Oklahoma Dep't of Pub. Safety* v. *United States*, petition for cert. pending, No. 98-1760; *Wisconsin Dep't of Transp.* v. *Reno*, petition for cert. pending, No. 98-1818; and *Reno* v. *Pryor*, petition for cert. pending, No. 99-61. If the Court simply denied certiorari in those cases, the current circuit conflict on the Tenth Amendment issue presented in this case would persist, even though the DPPA's restrictions as applied to those States would be tied to the receipt of federal funds.

APPENDIX

1. Section 350 of the Department of Transportation and Related Agencies Appropriation Act for Fiscal Year 2000, Pub. L. No. 106-69, 113 Stat. 1025, provides as follows:

> (a) No recipient of funds made available in this Act shall disseminate driver's license personal information as defined in 18 U.S.C. 2725(3) except as provided in subsection (b) of this section or motor vehicle records as defined in 18 U.S.C. 2725(1) for any use not permitted under 18 U.S.C. 2721.
>
> (b) No recipient of funds made available in this Act shall disseminate a person's driver's license photograph, social security number, and medical or disability information from a motor vehicle record as defined in 18 U.S.C. 2725(1) without the express consent of the person to whom such information pertains, except for uses permitted under 18 U.S.C. 2721(1), 2721(4), 2721(6), and 2721(9): *Provided*, that subsection (b) shall not in any way affect the use of organ donation information on an individual's driver's license or affect the administration of organ donation initiatives in the States.
>
> (c) 18 U.S.C. 2721(b)(11) is amended by striking all after "records" and inserting the following: "if the State has obtained the express consent of the person to whom such personal information pertains."
>
> (d) 18 U.S.C. 2721(b)(12) is amended by striking all after "solicitations" and inserting the following: "if the State has obtained the express consent of the person to whom such personal information pertains."
>
> (e) No State may condition or burden in any way the issuance of a motor vehicle record as defined in

18 U.S.C. 2725(1) upon the receipt of consent described in paragraphs (b) and (c).

(f) Notwithstanding subsections (a) and (b), the Secretary shall not withhold funds provided in this Act for any grantee if a State is in noncompliance with this provision.

(g) EFFECTIVE DATES.——

(1) Subsections (a) and (e) shall be effective upon the date of the enactment of this Act, excluding the States of Wisconsin, South Carolina, and Oklahoma that shall be in compliance with this subsection within 90 days after the United States Supreme Court has issued a final decision on Reno vs. Condon;

(2) Subsections (b), (c), and (d) shall be effective on June 1, 2000, excluding the States of Arkansas, Montana, Nevada, North Dakota, Oregon, and Texas that shall be in compliance with subsections (b), (c), and (d) within 90 days of the next convening of the State legislature and excluding the States of Wisconsin, South Carolina, and Oklahoma that shall be in compliance within 90 days following the day of issuance of a final decision on Reno vs. Condon by the United States Supreme Court if the State legislature is in session, or within 90 days of the next convening of the State legislature following the issuance of such final decision if the State legislature is not in session.

2. The Conference Report on Pub. L. No. 106-69 (H.R. 2084), H.R. Conf. Rep. No. 106-355, 106th Cong., 1st Sess. 121 (1999), states:

> Sec. 350 modifies language proposed by the Senate that protects personal and related information on motor vehicle records. The Senate proposed prohibiting funds in this Act to execute a project agreement for any highway project in a state that sells drivers' license personal information and drivers' license photographs unless that state has established and implemented an opt-in process for such information and photographs. The prohibition on the sale of written information applies only if sold for purposes of surveys, marketing or solicitations. The House proposed no similar provision.
>
> It is the conferees' intent that personal information, such as name, address, and telephone number, can still be distributed as specified by the Driver Protection Privacy Act [*sic*] and this Act.

3. The following statement was made by Senator Richard Shelby on the floor of the Senate with respect to Section 350 of the DOT Act (145 Cong. Rec. S11,863 (daily ed. Oct. 4, 1999)):

> I want to mention one other issue that has been the topic of many conversations over the past couple of weeks. That is, the Senate provision concerning the release of personal information by state departments of motor vehicles. My concern is that private information is too available. The proliferation of information over the Internet makes it easy and cheap for almost anyone to access very personal information.
>
> I think members would be shocked by what virtually anyone—including w[ei]rdos and stalkers—can find out about you, your wife, or your children with only a rudimentary knowledge of how to search the Internet.
>
> I believe that there should be a presumption that personal information will be kept confidential, unless there is compelling state need to disclose that information.

Most states, however, readily make this information available, and because states sell this information, a lot of information about you effectively comes from public records.

Section 350 of the conference report protects personal information from broad distribution by requiring express consent prior to the release of information in two situations. First, individuals must give their consent before a state is able to release photographs, social security numbers, and medical or disability information. Of course, this excludes law enforcement and others acting on behalf of the government. Second, individuals must give their consent before the state can sell or release other personal information that is disseminated for the purpose of direct marketing or solicitations. I want to be clear: this applies only when the state sells your name, address, and other such information to people who are using that information for marketing purposes.

We recognize that states may need time to comply with this provision. And we've proposed to delay the effective date 9 months. In addition, there was concern expressed about this provision being tied to transportation funds under this bill, and the conference agreement eliminates the sanction language and expressly states that no states' fund [*sic*] may be withheld because of non-compliance with this provision. In addition, the Congressional Budget Office has performed a cost estimate of this provision, and found that the total implementation cost for States is well below $50 million nationally.

I believe that the general public would be as shocked as my colleagues in the Senate if they learned that states

were running a business with the personal information from motor vehicle records.

4. H.R. 2084, as initially passed by the Senate on September 16, 1999 (comprising the substance of S. 1143, as reported by the Senate Appropriations Committee on May 27, 1999), contained the following provision:

> SEC. 339. (a) PROHIBITION—Except as otherwise provided in subsection (c), no recipient of funds made available under this Act may sell, or otherwise provide to another person or entity, personal information (as defined in 18 U.S.C. Section 2725(3)) contained in a driver's license, or in any motor vehicle record (as defined in 18 U.S.C. Section 2725(1)) without the express written consent of the individual to whom the information pertains.
>
> (b) CONSENT—No recipient of funds made available under this Act may condition or burden in any way the issuance of a motor vehicle record (as defined in 18 U.S.C. Section 2725(1)) upon the receipt of consent described in subsection (a).
>
> (c) LAW ENFORCEMENT—Subsection (a) does not apply to a law enforcement agency in any case in which the application of that subsection would hinder the ability of that law enforcement agency, acting in accordance with applicable law, to gain access to a driver's license or photograph of an individual.

5. The Report of the Senate Appropriations Committee on S. 1143, S. Rep. No. 55, 106th Cong., 1st Sess. 166 (1999), states:

> SEC. 339. Includes a provision which prevents the distribution of personal data from drivers licenses without express written consent of the individual.

(18)

oct. 25, 1999

No. 98-1464

In the Supreme Court of the United States

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, ET AL., PETITIONERS,

v.

CHARLIE CONDON, ATTORNEY GENERAL FOR THE STATE OF SOUTH CAROLINA, ET AL., RESPONDENTS.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SUPPLEMENTAL BRIEF FOR RESPONDENTS

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§ 350, 113 Stat. 1025 ..... *passim*
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§ 350(d) 1
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§ 350(f) 1, 2, 3
§ 350(g) 1

Driver's Privacy Protection Act of 1994,
18 U.S.C. §§ 2721-2725 (1994 &
Supp. III 1997) ..... *passim*

This Supplemental Brief is filed in response to the Supplemental Brief filed by the Government on October 20, 1999, and for the purpose of bringing to the attention of the Court additional authorities relative to the situation created by the enactment of Section 350 of Public Law No. 106-69, 113 Stat. 986 (DOT Act).

Respondents agree with the Government that the enactment of the DOT Act does not render the issues in this case moot, nor does it require that the writ of certiorari be dismissed as improvidently granted. Respondents also agree with the Government's suggestion that the Court may wish to remand the case. Respondents do not, however, agree that the Spending Clause issues implicated by the passage of the DOT Act are likely to result in a favorable decision for the Government. The DOT Act gilds the DPPA with only the thinnest veneer of constitutional legitimacy, a veneer which will not likely withstand even mild scrutiny by the courts below.

The sections of the DOT Act of primary constitutional concern are Sections 350(a), 350(b), 350(e) and 350(f).[1] Section 350(a) provides that "no recipient of [DOT] funds . . . shall disseminate driver's license personal information" as defined in the Driver's Privacy Protection Act (DPPA) for any use not permitted by the DPPA. Section 350(b) places other disclosure restrictions, some tied to the DPPA and some of which are new, on recipients of DOT funds. Recipients of DOT funds, of course, include State governments. Section 350(e), without reference to

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[1] Sections 350(c) and 350(d) amend the DPPA in a manner which does not appear to affect any issue relevant to the DPPA's constitutionality. Section 350(g) deals with the DOT Act's various effective dates.

recipients of federal funds, prohibits the States from conditioning the issuance of motor vehicle records on a citizen's agreement to opt in to permit public disclosure of his or her personal information. Finally, Section 350(f) provides that

> notwithstanding subsections (a) and (b), the Secretary shall not withhold funds provided in this Act for any grantee if a State is in noncompliance with this provision.

The effect of the DOT Act on this case is that it adds Spending Clause issues to the Tenth Amendment issues raised in this case. Respondents submit that the Spending Clause issues will prove to be utterly meritless, but their existence makes it unlikely that this case in its present posture can resolve all constitutional challenges to Congress's efforts to legislate with respect to state DMV records. In other words, assuming without conceding that there is any arguable merit at all to the Government's suggestion, U.S. Supp. Br. at 8, that the DOT Act has converted the DPPA into valid legislation enacted under the Spending Clause, the existence of that issue means that the present case cannot now resolve all constitutional issues surrounding Congress's efforts to legislate with respect to state DMV records. A decision by the Court of the issues now before it would therefore not now result in a complete adjudication of all constitutional issues pertaining to the DPPA and, as of October 9, 1999, the DOT Act.

Respondents join in the Government's suggestion with reluctance because, as the Government itself states, the Tenth Amendment challenge to the DPPA "is not moot, and

is fully briefed and ready for argument." U.S. Supp. Br. at 10. It is unfortunate that a remand appears to be necessary to resolve an issue which is likely to prove meritless. The DOT Act does not condition the receipt of federal funds on compliance with Sections 630(a) and (b); to the contrary, Section 630(f) specifically provides that a State which does not comply with its provisions will nevertheless continue to receive all DOT funds. It is therefore difficult to see how Section 630 can be upheld as a valid condition on federal spending when it is not a condition at all. Even if the DOT Act could somehow be viewed as a condition on federal spending, it would not be a valid one under *South Dakota v. Dole*, 483 U.S. 203 (1987), because issues about the disclosure of DMV information are "unrelated to the federal interest in particular national projects or programs." *Id.* at 208. By enacting the DOT Act, Congress may have succeeded in merely prolonging the DPPA's existence for a time, without in any way curing the constitutional defects of Congress's actions.

If this case is remanded, Respondents intend to take whatever procedural steps are necessary to challenge the constitutionality of the DOT Act. At this juncture, Respondents are uncertain whether these issues can be addressed by the court of appeals, or whether the case must be remanded by that court to the district court. Respondents would request that if the Court should decide to remand the case, such remand be made with leave to amend the pleadings if necessary. *See Diffenderfer v. Central Baptist Church*, 404 U.S. 412, 415 (1972)(remand to three-judge district court with leave to amend complaint "to attack the newly enacted legislation" where the ordinance originally under attack was mooted by enactment of new ordinance).

CONCLUSION

Respondents are prepared to argue the merits of this case on November 10, 1999, as scheduled, but join in the suggestion of the Government that the Court may wish to consider a remand of this case for consideration of issues raised by the DOT Act.

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No. 98-1464

IN THE
Supreme Court of the United States

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,

Petitioners,

v.

CHARLIE CONDON, ATTORNEY GENERAL FOR THE STATE OF SOUTH CAROLINA, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF AMICUS CURIAE OF THE ELECTRONIC PRIVACY INFORMATION CENTER IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICUS CURIAE*

The Electronic Privacy Information Center is a project of the Fund for Constitutional Government, a non-profit charitable organization, incorporated in the District of Columbia in 1974. EPIC was established to focus public attention on emerging privacy and civil liberties issues

This case concerns the authority of the federal government to enact privacy laws that protect the privacy interests of individuals. Because the court below failed to give sufficient weight to the privacy interests underlying the Drivers Privacy Protection Act, we respectfully submit this brief as amicus curiae.

SUMMARY OF THE ARGUMENT

The Drivers Privacy Protection Act safeguards the personal information of licensed drivers from improper use or disclosure. It is a valid exercise of federal authority in that it seeks to protect a fundamental privacy interest. It restricts the activities of states only to the extent that it concerns the subsequent use or disclosure of the information in a manner unrelated to the original purpose for which the personal information was collected. The states should not

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* Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. In accordance with Rule 37.6, it is stated that the Counsel of Record authored the brief with the assistance of Alex Driggs, a law student, and that no monetary contributions were made for the preparation or submission of the brief.

impermissibly burden the right to travel by first compelling the collection of sensitive personal information and then subsequently disclosing the same information for unrelated purposes.

The Fourth Circuit failed to give sufficient weight to the privacy interests at issue in the Drivers Privacy Protection Act. For this reason, the decision of the lower court should be reversed.

ARGUMENT

I. The Driver's Privacy Protection Act is a Valid Exercise of Congressional Power Authorized By the 14th Amendment

The Fourteenth Amendment provides, in part, that:

> Section 1. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> [...]
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

U.S. Const. amend. XIV, §§1, 5. This Court has described Section 5 as "a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966). More recently, this Court rejected "the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States." *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997). However, the Driver's Privacy Protection Act. 18 USC 2721-2725 [hereinafter "The Act"] is not an attempt to create new constitutional protections. Rather, the privacy interests protected by the Act are well established.

In *Roe v. Wade*, 410 U.S. 113, 153 (1973), this Court held that the right of privacy is "founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action." In *Whalen v. Roe*, 429 U.S. 589, 599 (1977) and *Nixon v. Administrator of General Services*, 433 U.S. 425, 457 (1977), this Court declared that the constitutional right to privacy respects "the individual interest in avoiding disclosure of personal matters." The *Whalen* Court also noted "the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files." 429 U.S. at 605. The present controversy squarely presents a question left unanswered in *Whalen*: whether the intentional disclosure of personal information compiled by a State agency violates the right to privacy guaranteed by the Fourteenth Amendment.

A. Individuals have a constitutional interest in limiting the collection and use of personal information obtained by state agencies.

In *Wilson v. Layne*, ___ U.S. ___, 119 S.Ct. 1692 (1999), this Court said that government actions during a search must be "related to the objectives of the authorized intrusion." *Id.* at 1698. As a result, state police were not permitted to bring reporters and photographers into a private home during the execution of a lawful warrant. The occupants in the home had a constitutionally protected right to limit the public disclosure of information pertaining to the search even though the state authorities had the lawful authority to enter the premises.

While the information collected by a state agency for the purpose of issuing drivers licenses is not a search for Fourth Amendment purposes, it is gathered for a specific purpose related to the protection of public safety and the administration of state roadways. As this Court made clear in *Wilson*, a state intrusion is impermissible it "bears no direct relation to the constitutional justification for the . . . intrusion." 119 S.Ct at 1698.

A state Department of Motor Vehicles may compel the collection of certain personal information necessary to administer the licensing system and to safeguard public safety. However, the personal information should be used only for licensing-related uses, absent the party's consent. Moreover, it is consistent with the licensee's expectation of privacy that information that is collected for a particular purpose will be used for that purpose. "Those who disclose

certain facts to a bank or phone company for a limited business purpose need not assume that this information will be released to other persons for other purposes." *Smith v. Maryland*, 442 U.S. 735, 749 (1979)(Marshall, J., dissenting).

Limitations on the ability of states to collect personal information were also recognized by this Court in *Chandler v. Miller*, 520 U.S. 305 (1997). In that case, the Court struck down a state drug testing requirement for candidates for political office. The Court held that the drug test does not fall within the narrow category of constitutionally permissible suspicionless searches. *Id.* at 309. In *Chandler* the Court further noted that the intrusiveness of mandatory drug testing was mitigated in part because "the results of the test are given first to the candidate, who controls further dissemination of the report." *Id.* At 318. In *Chandler* the Court implicity recognized the central tenets of information privacy – the right of individuals to limit the collection of personally identifiable information and the right to obtain access to that information when it is collected – to a state statute that would have otherwise enabled the collection of sensitive personally identifiable information, much like the information at issue in this case. As the Court said in *Reporters Committee*, "both the common law and the literal understandings of privacy encompass the individual's control of information concerning his or her person." *Dep't. of Justice v. Reporters Comm. for Freedom of the Press*, 489 US 749, 763 (1989).

The DPPA seeks to give drivers similar control over personal information. In adopting the Act, Representative Moran, a sponsor of the DPPA, said "Currently in 34 states

across the country anyone can walk into a DMV office with your tag number, pay a small fee, and get your name, address, phone number, and other personal information–no questions asked." 140 Cong. Rec. H2522 (daily ed. Apr. 20, 1994).

The data protected by the DPPA includes "information that identifies an individual, including an individual's photograph, social security number, driver identification number, name, address (but not the 5-digit zip code), telephone number, and medical or disability information, but does not include information on vehicular accidents, driving violations, and driver's status." 18 U.S.C. §2725(3).

The privacy interest in avoiding disclosure of contact information—name, address, and telephone number—was recognized in *Dep't of Defense v. Fed. Labor Relations Auth.*, 510 U.S. 487, 500 (1994). In upholding exemption of home address information from disclosure under the Labor Relations Act, this Court noted that "[a]n individual's interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may be available to the public in some form." *Id.* at 501. *See also, Reporters Committee,* 489 U.S. at 767, 770. This Court further characterized this interest as "far from insignificant," owing in part to the potential abuse of contact information by commercial entities.

The Court has also recognized similar limitations on the disclosure of personal information held by federal agencies that might otherwise be disclosed under the Freedom of Information Act, 5 U.S.C. 552 (1999). *Reporters*

Comm., 489 US 449 (1989) (FBI "rap sheets"). Other courts have interpreted Whalen as creating a constitutional right to confidentiality. *See, e.g., Utz v. Cullinane*, 520 F.2d 467, 482 n.41 (D.C. Cir. 1975) (pre-conviction or post-exoneration arrest data), *Plante v. Gonzalez*, 575 F.2d 1119, 1132 (5th Cir. 1978), cert. denied, 439 U.S. 1129 (1979) (financial information), *Hawaii Psychiatric Soc'y Dist. Branch v. Ariyoshi*, 481 F.Supp. 1028, 1043 (D. Hawaii 1979) (psychiatric records); But see *American Fed'n of Gov't Employees v. Dep't of Housing and Urban Development*, 118 F.3d 786, 791 (D.C. Cir. 1997), *Doe v. Wigginton*, 21 F.3d 733, 740 (6th Cir. 1994).

B. Individuals have a reasonable expectation of privacy regarding information submitted to a state DMV

The lower court relied on *California v. Carney*, 471 U.S. 386, 392 (1986), for the proposition that vehicle licensing schemes lead to reduced privacy expectations. *Condon v. Reno*, 155 F.3d 453, 465 (4th Cir. 1998). However, *Carney* concerned one's expectations of privacy while in driving in a car. The argument that decreased automotive privacy is the expected social cost of effective regulation of cars is irrelevant to the issue of information privacy. The Court has said that there is a diminished expectation of privacy in cars because of the state's role in regulating vehicle safety. *Carney*, 471 U.S. at 392-93.

There is no similar interest here. When a state invades a person's privacy by selling personal information, it does not further any public safety purpose. The fact that the

information may be sold to anyone for any purpose, absent regulation, underscores the lack of a specific, articulable policy goal. Consequently, federal regulation of data sales does not impede a state's ability to ensure safety on its roads. As the Seventh Circuit recognized, "[n]othing in the DPPA interferes with states' ability to license drivers and remove dangerous ones from the road; it regulates external rather than internal uses of information." *Travis v. Reno*, 163 F.3d 1000, 1003 (7th Cir. 1998).

The "distribution" of personal information that is displayed on the license—for cashing a check, using a credit card, or boarding a commercial flight—is similarly distinguishable. Using a driver's license to verify identity does not require the recording and dissemination to third parties of personal information. The Act, by allowing states to implement an opt-out procedure, requires the same consent for disclosure to third parties as would be available to an individual in the display of a license for authentication.

Finally, the Act is consistent with the lower court's precedents that treat motor vehicles as public records. *See Condon*, 155 F.3d at 465. The DPPA permits the public availability of vehicle information, such as vehicle registration and accident histories, while maintaining the privacy of certain personally identifiable information. Furthermore, even an individual's personal information can be publicly available if the state implements an opt-out procedure that enables the individual licensee to authorize subsequent disclosure if he or she wishes.

C. Legitimate state interests regarding use of personal information are preserved by the DPPA

Before a governmental entity can override the constitutional protection of personal information, a "vital" or "compelling" state interest must be established. *See Whalen*, 429 U.S. at 598, and 606 (Brennan, J., concurring). The state interest in collecting personal information is grounded in the state's duty to regulate safe operation and maintenance of motor vehicles. However, such regulation requires only internal use of personal data, which the DPPA does not affect. "[T]he activity under consideration is not licensing but disclosure." *Travis v. Reno*, 163 F.3d at 1004.

Furthermore, the Act explicitly allows States to create individualized disclosure policies regarding necessary uses, those "related to the operation of a motor vehicle or public safety." 18 U.S.C. §2721(b)(14). Thus the DPPA restricts only disclosures unrelated to legitimate purposes of licensing and state regulation.

The state interest in the public disclosure of personal information regulated by the Act is either non-existent or purely economic. *See Condon v. Reno*, 972 F.Supp. 977, 990 (D.S.C. 1997) ("the State . . . has offered no specific interest (other than historical) to justify its need to allow its motor vehicle records to be publicly disseminated.") The Seventh Circuit noted that Wisconsin generated $8 million annually from the sale of DMV records. *See Travis*, 163 F.3d at 1002. Other states have found DMV record sales even more

lucrative: Maryland earned $12.9 million in 1996,[1] Pennsylvania received $20.6 million in 1998,[2] and New York has collected almost $50 million a year since 1994.[3]

II. The DPPA Removes an Unconstitutional Burden on the Right to Travel

Even if the privacy interest in control over private, secondary uses of personal information does not rise to a constitutional level, State laws authorizing public disclosure of DMV records violate the Fourteenth Amendment by excessively burdening the right to travel. Therefore, the adoption of federal legislation to protect the privacy of motor vehicle records is consistent with Congressional § 5 powers.

A. The right to travel is constitutionally protected

The right of free passage in and between states has been recognized repeatedly in this Court's decisions, most recently in *Saenz v. Roe*, ___ U.S. ___, 119 S.Ct. 1518, 1524 (1999)(noting that this right is "firmly embedded in our jurisprudence"). In *Saenz* this Court further characterized the right to travel as "a virtually unconditional personal right." *Id.*, quoting *Shapiro v. Thompson*, 394 U.S. 618, 634

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[1] Rajiv Chandrasekaran, *Governments Find Information Pays*, WASHINGTON POST, March 9, 1998, at A1.

[2] Reid Kanaley, *Consumer Privacy Debate Continues in Pennsylvania*, THE PHILADELPHIA INQUIRER, June 13, 1999.

[3] James M. Odato, *DMV Data a Revenue Vehicle*, THE TIMES UNION (Albany, NY), February 7, 1999, at A1.

(1969)(Stewart, J., concurring). Any imposition upon this right violates the Equal Protection Clause, unless it is justified by a compelling state interest. *See Saenz*, 119 S.Ct. at 1524.

B. Availability of DMV records for public and commercial use impermissibly burdens the right to travel

As discussed *supra*, the state's legitimate interest in collecting and distributing personal information is limited to internal use and vehicle-related external uses. Given the lack of a compelling state interest justifying public disclosure and commercial use of DMV records, any burden it places on travel rights is impermissible.

A recent study by the Bureau of Transportation Statistics suggests that virtually all travel in the United States is performed by means requiring a state-issued license or identification card. A valid driver's license is required to drive a motor vehicle, and either a license, a state ID card, or passport must be presented before boarding a commercial flight. The study found that these means of transportation accounted for over 96% of personal and household travel in 1995.[4]

The practical impossibility of travel without state-issued ID lends a constitutional dimension to the privacy interest in avoiding disclosure and commercial use of DMV

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[4] BUREAU OF INFORMATION STATISTICS, U.S. DEPARTMENT OF TRANSPORTATION, 1995 American Travel Survey, Pub. BTS/ATS95-US, at 3, 13 (1997).

records. Without adequate protection of personal information maintained by state DMVs, citizens must essentially choose between privacy and the right to travel. Such a choice places an unreasonable burden on a protected interest. The Fourth Circuit reached a similar result in *Greidinger v. Davis*, 988 F.2d 1344 (4th Cir. 1993), a case challenging the constitutionality of a Virginia statute requiring public disclosure of registered voters' Social Security numbers. Conditioning the exercise of a basic right on the public disclosure of such personal data was ruled an "intolerable burden" on individual rights. *Id.* at 1355. The public release of personal information maintained by a state agency was *Greidinger*'s touchstone—the court noted that provision of personal data for internal agency use did not threaten the plaintiff's right to vote. *Id.* at 1354 n.10.

C. The DPPA is a narrowly tailored legislative response to these concerns

The DPPA regulates public and commercial access to DMV records, the licensing practices that most threaten individual rights. The DPPA's opt-out provisions for public and commercial uses constitute a narrowly tailored mechanism that eliminates the privacy burden on citizens' right to travel. An opt-out system allows drivers to limit disclosure of personal information without forgoing travel rights. States that choose not to implement opt-out provisions may only distribute personal information for other approved uses. Hence under the DPPA an individual's

information is available for public and commercial use either consensually or not at all.

By narrowly eliminating the barriers to free travel erected by state DMVs, The DPPA is a legitimate exercise of Congress's authority to enforce the provisions of the Fourteenth Amendment.

III. The DPPA is Consistent With Constitutional Principles of Federalism

A. The DPPA creates a baseline standard of privacy protection for state DMV records

Federal legislation establishing minimum standards for state regulatory schemes was upheld by this Court in *Hodel v. Virginia Surface Mining & Reclamation Ass'n.*, 452 U.S. 264 (1981). The baseline approach was approved as "a program of cooperative federalism that allows the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs . . ." *Id.* at 289 (listing cases).

The language from *Hodel* is remarkably similar to comments made on the Senate floor by Senator Barbara Boxer, one of the Act's sponsors:

> This amendment simply gives people more control over the disclosure of their personal information .... States are free to be more restrictive with this information. This bill simply takes a national problem

and gives the States broad latitude and nine months to enact a national solution.

139 Cong. Rec S 15764 (Nov. 16, 1993).

Federal privacy legislation frequently establishes similar baselines that permit sates to regulate upward if they wish. *See, e.g.,* The Video Privacy Protection Act, 18 U.S.C. § 2710(f). In this manner, the exercise of federal authority to protect privacy still allows states to function as "laboratories of democracy." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). In testimony before a House subcommittee, Representative Moran confirmed that the Act creates a minimum standard that states may strengthen. *See* 1994 WL 212698 (Feb. 4, 1994).

States themselves have treated the Act as a baseline standard—many have passed stricter restrictions on access to DMV records than the Act requires.[5] Fourteen states have much tighter controls, prohibiting commercial and public access to personal information without the licensee's express written consent. Thirty states have implemented an opt-out system for disclosure to private users, commercial users, or both. Finally, a number of states have adopted unique record disclosure systems. For example, Hawaii's system incorporates a high degree of individual choice. Drivers may set individual preferences for data release.[6] In Colorado, news organizations may access records freely, but only for

[5] PUBLIC RECORD RESEARCH LIBRARY, The MVR Book: Motor Services Guide (Rev. ed. 1999)

[6] *Id.* at 79.

verification of address information.[7] The variety of state responses to the Act illustrates that the statute creates only a minimum standard of privacy protection, allowing ample room for state innovation. Indeed, the Act explicitly encourages experimentation by allowing states to disclose information "for any other use specifically authorized under the law of the State that holds the record, if such use is related to the operation of a motor vehicle or public safety." 18 U.S.C. § 2721(b)(14).

B. The DPPA does not "commandeer" state legislative authority

Although this Court's Tenth Amendment jurisprudence recognizes a distinction between statutes that are generally applicable, affecting both states and private parties, and those directed exclusively at state behavior, this Court has never held that a law affecting states must be generally applicable to survive constitutional scrutiny. *See New York v. United States*, 505 U.S. 144, 160 (1992) (noting the distinction). On the contrary, this Court has upheld statutes that directly regulate state administrative policies. In *South Carolina v. Baker*, this Court considered a federal tax code provision requiring states to issue bonds in registered form. *See* 485 U.S. 505, 514-15 (1988). The *Baker* Court rejected the argument that a state's compliance costs represented impermissible federal commandeering of the state legislative and administrative process. *Id. See also*

[7] *Id.* at 49.

Hodel, 452 U.S. 264, 288 (1981) (prohibiting Congress from forcing states to "enact and enforce a federal regulatory program"). Because the DPPA is virtually identical to the statute in *Baker*—a state-targeted statute which imposes implementation costs—the question of general applicability need not even arise.

Further, as Judge Phillips noted in dissent below, the DPPA did not "commandeer" the South Carolina legislature because the state could have stopped selling information compiled from motor vehicle records. *Condon* at 467. Judge Phillips also found that because the DPPA directly regulates a state agency, it differs fundamentally from statutes that indirectly regulate private conduct, such as the ones invalidated in *New York* and *Printz*. *Id.* at 466-67. Following *South Carolina v. Baker*, he concluded that the DPPA is a similarly permissible federal regulation of state governments. *Id.*

Under the DPPA states are regulated only to the extent that they choose to take personal information provided to a state agency for the purpose of a obtaining a license to operate a motor vehicle on a public roadway and then subsequently sell or disclose that information to purposes unrelated to the operation of the Department of Motor Vehicle or the protection of public safety.

CONCLUSION

The Drivers Privacy Protection Act safeguards the personal information of licensed drivers from improper use or disclosure. It is a valid exercise of federal authority in that it

seeks to protect a fundamental privacy interest. It restricts the activities of states only to the extent that it concerns the subsequent use or disclosure of the information in a manner unrelated to the original purpose for which the personal information was collected. The states should not impermissibly burden the right to travel by first compelling the collection of sensitive personal information and then subsequently disclosing the same information for unrelated purposes. For these reasons, we respectfully urge the Court to reverse the decision of the lower court.

Dated: July 15, 1999

Respectfully submitted,

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No. 98-1464

SUPREME COURT OF THE UNITED STATES

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES,

Petitioner,

v.

CHARLIE CONDON, ATTORNEY GENERAL OF SOUTH CAROLINA,

Respondent

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF FEMINIST MAJORITY FOUNDATION, et. al., (Additional amici listed on inside cover) AMICI CURIAE IN SUPPORT OF PETITIONER UNITED STATES

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American Civil Liberties Union
American College of Obstetricians and Gynecologists
Center for Reproductive Law & Policy
National Abortion Federation
National Abortion and Reproductive Rights Action League
National Center for Victims of Crime
National Coalition of Abortion Providers
National Coalition Against Domestic Violence
National Organization for Women Foundation, Inc.
National Women's Health Organization
NOW Legal Defense and Education Fund
Pennsylvania Coalition Against Domestic Violence
Physicians for Reproductive Choice and Health
Planned Parenthood Federation of America, Inc.
STOPDV, Inc.
The Women's Law Project

QUESTION PRESENTED

Amici curiae present this Question as appropriate for resolving this case and encompassed by the grant of certiorari.

Whether Congress, pursuant to its authority under the Commerce Clause and section five of the Fourteenth Amendment, may prohibit state governments from disclosing private identifying information so as to protect women from stalking and violence and to enforce women's ability to exercise their constitutional right to abortion.

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98-1464

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, *Petitioner*

v.

CHARLIE CONDON, ATTORNEY GENERAL OF SOUTH CAROLIANA, *Respondent.*

INTERESTS OF AMICI CURIAE[1]

Amici curiae are organizations that are dedicated to protecting the rights and health of women. Amici curiae present this brief out of their profound concern for how information gained from motor vehicle records can be used to stalk women and to intimidate health care providers who perform abortions. Specifically, the following organizations join this brief as amici curiae:

Feminist Majority Foundation ("Foundation") is a non-profit organization with offices in Arlington, Virginia and Los Angeles, California. The Foundation is dedicated to eliminating sex discrimination and violence against women, and to the promotion of equality, women's rights and safe access to abortion and birth control. The Foundation actively pursues legal protection for reproductive health service

[1]Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for amici state that no counsel for a party authored this brief in whole or in part and that no person, other than amici, its members, or its counsel, made a monetary contribution to the preparation and submission of this brief.

providers, and provided legal counsel for Respondents in Madsen v. Women's Health Center, Inc., 512 U.S. 753 (1994), which upheld the use of clinic safety buffer zones.

The Foundation's National Clinic Access Project, the largest clinic access program in the nation, has mobilized and trained more than 45,000 volunteers in 47 cities in 26 states over the last 10 years. The Foundation's Project has spent significant time and resources protecting access to women's health clinics around the country, providing emergency financial, legal and security assistance. The Foundation also runs the National Center for Women & Policing, which seeks to increase the numbers of women in law enforcement and improve police response to violence against women. The National Center is a recognized leader nationwide in developing educational programs and conducting training for law enforcement on the most effective practices in responding to violence against women including stalking and domestic violence cases. The Foundation believes that the Driver's Privacy Protection Act is important to protect women from harassment, stalking and murder and to protect women's access to abortion and reproductive health services.

American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. It has appeared before this Court on numerous occasions, both as direct counsel and as amicus curiae. The ACLU joins this brief in support of the Driver's Privacy Protection Act because the legal issues in this case do not arise in a vacuum. To the contrary, they directly affect the personal safety and reproductive choices of women throughout the

country, as described in great detail below. Those concerns have long been central to the mission of the ACLU's Women's Rights Project and the ACLU's Reproductive Freedom Project. More generally, the ACLU has been deeply engaged in the battle to preserve the right to privacy in a digital age when governments at every level are increasingly willing and able to treat personal information as yet another commodity available for sale. In its view, the constitutional authority of Congress to act under these circumstances was clear, and the judgment of the Fourth Circuit below should accordingly be reversed.

American College of Obstetricians and Gynecologists (ACOG) is a private, non-profit, voluntary organization, whose more than 39,000 members represent over 95% of board-certified obstetricians and gynecologists in the United States. ACOG is a leading organization of health care professionals dedicated to providing health care for women.

ACOG's interest in this case is twofold. First, as an organization of physicians serving women, ACOG recognizes that domestic violence is a major threat to women's health, and supports legislation and other measures to reduce the incidence of violence against women. Secondly, ACOG is concerned by the increase in harassment and violence against physicians, other health care providers and clinics offering reproductive health services, including abortions. ACOG's members firmly believe that violence against health care professionals is never acceptable.

Center for Reproductive Law & Policy (CRLP) is a public interest law firm dedicated to protecting women's access to reproductive health care in the United States and around the world. CRLP is particularly concerned with preserving women's ability to obtain abortions confidentially and without being subject to harassment by anti-choice activists. CRLP

believes that disclosure of women's names and addresses to people who obtain license plate identification is a significant means by which such activists identify and target women for harassment.

National Abortion Federation (NAF) is the professional association of abortion providers in the United States and Canada. NAF members include over 350 nonprofit and private clinics, women's health centers, Planned Parenthood facilities, and private physicians in 46 states, the District of Columbia, and Puerto Rico. NAF's programs include accredited medical education and training, clinic defense, public and consumer education, and advocacy in furtherance of its mission to keep abortion, safe, legal, and accessible.

As an organization representing abortion providers who have endured kidnapping, stalking, death threats, attempted murder, murder, and numerous other incidents of violence, NAF is committed to ensuring the physical safety of providers and their patients. Such violence places not only health care providers and patients in danger, but also jeopardizes all women's access to abortion services. NAF believes that the Driver's Privacy Protection Act's provisions restricting public access to personal information is a crucial element in protecting providers and patients from future violence.

National Abortion and Reproductive Rights Action League (NARAL) and the NARAL Foundation, with NARAL's 29 affiliated state organizations and over 200,000 members and supporters, develop and sustain a constituency that uses the political process to guarantee every woman the right to make personal decisions regarding the full range of reproductive choices, including preventing unintended

pregnancy, bearing healthy children, and choosing legal abortion. The NARAL Foundation supports and protects a woman's right to make reproductive choices as a fundamental freedom. This mission is supported through education, training programs, and public policy initiatives. NARAL participated actively in promoting the Freedom of Access to Clinic Entrances Act (FACE) and promotes clinic violence prevention in the states. NARAL has participated previously as amicus curiae in clinic violence cases.

National Center for Victims of Crime ("National Center," formerly National Victim Center) is a nonprofit organization headquartered in Arlington, Virginia. The National Center is the nation's most effective resource and advocacy center for victims of crime. The mission of the National Center is to forge a national commitment to help victims of crime rebuild their lives. The National Center is dedicated to serving individuals, families, and communities harmed by crime. Among other things, the National Center advocates laws and public policies that create resources and secure rights and protections for crime victims. The National Center has a particular interest in this brief due to its extensive work and dedication to representing the interests of stalking victims.

National Coalition Against Domestic Violence (NCADV), founded in 1978, is a grassroots organization representing a national network of over 2,000 local programs and state coalitions that serve battered women and their children. NCADV serves as a national information and referral center for the general public, the media, battered women and their children, agencies and organizations. NCADV provides information and technical assistance, and promotes the development of innovative model programs

which address the special needs of battered women and battered women's programs.

NCADV is committed to ensuring the safety of domestic violence victims and to advocating for laws that protect women's safety. The Driver's Privacy Protection Act of 1994 significantly helps domestic violence victims by preventing the tracking of victims through the departments of motor vehicles. Many women are first tracked down in this manner and later physically harmed or killed. NCADV joins this brief of amici curiae to assist the Supreme Court in the consideration of the critical issue of the safety for battered women and children as well as justice for women seeking abortions.

National Organization for Women Foundation, Inc., is a 501(c)(3) organization devoted to furthering women's rights through education and litigation. NOW Foundation is affiliated with the National Organization for Women, the largest feminist organization in the United States, with over 500,000 contributing members in more than 600 chapters in all 50 states and the District of Columbia. Since its inception in 1986, a major goal of NOW Foundation has been to ensure full equality for women, including reproductive freedom and the elimination of violence against abortion providers and the women who use their services. Towards that goal, NOW Foundation has supported related litigation and legislation, including passage of the Freedom of Access to Clinic Entrances Act and winning the landmark Racketeer Influenced and Corrupt Organizations Act case, N.O.W. v. Scheidler.

National Women's Health Organization (NWHO) was founded in 1976 to provide abortion and other women's health services to women in underserved and rural areas. NWHO serves as a management company for eight women's

health clinics around the country. The NWHO clinics have been plaintiffs in over 30 cases, including N.O.W. v. Scheidler, No. 86-7888, a nationwide class action against lead anti-abortion extremists under the racketeering laws. In 1994, this Court unanimously held that the Racketeer Influenced and Corrupt Organizations Act did not require an economic motive, thus allowing this case to go to trial. In 1998, the jury returned a unanimous verdict in favor of the plaintiffs.

NWHO clinic staff, doctors, and patients have been stalked, harassed, threatened, and even murdered by anti-choice extremists. Dr. David Gunn, who was murdered by Michael Griffin in 1993, worked at NWHO's Columbus, Georgia facility. Anti-abortion extremists have taken down staff, doctor, volunteer and patient license plate numbers and harassed these people at home, among other places. NWHO supports the Driver's Privacy Protection Act as a vital part of ensuring that women and staff are able to provide medical care and exercise constitutional rights without fear of violence.

NOW Legal Defense and Education Fund (NOW LDEF) is a leading national non-profit civil rights organization that performs a broad range of legal and educational services in support of women's efforts to eliminate sex-based discrimination and to secure equal rights for women. NOW LDEF was founded as an independent organization in 1970 by leaders of the National Organization for Women.

A primary focus of NOW LDEF is work in support of the rights of women who have been the victims of domestic and gender-motivated violence. Most notably, NOW LDEF chaired the national task force that was instrumental in passing the historic Violence Against Women Act ("VAWA"), and is litigating the initial cases brought under the VAWA's Civil Rights Remedy, including Brzonkala v. Virginia Polytechnic,

169 F.3d 820 (4th Cir. 1999), *petition for cert. filed* (June 30, 1999)(No. ___). In addition, NOW LDEF works extensively to secure reproductive rights for all women. To this end, NOW LDEF has litigated numerous cases involving clinic violence and efforts to protect safe access to reproductive health services, and intervened on behalf of doctors, women and clinics to defend the Freedom of Access to Clinic Entrance Act (FACE), 18 U.S.C. §248, against constitutional challenges.

Pennsylvania Coalition Against Domestic Violence, Inc. (PCADV) is a not-for-profit organization incorporated in the Commonwealth of Pennsylvania for the purpose of providing services and advocacy on behalf of victims of domestic violence and their minor children. PCADV is a membership organization of 64 shelters, hotlines, counseling programs, safe home networks, legal advocacy projects, and transitional housing projects for battered women and their dependent children in the Commonwealth. For over twenty years, PCADV has provided training and technical assistance to domestic violence programs, attorneys, the courts, and law enforcement agencies on issues of domestic violence.

PCADV is deeply concerned about the safety of victims of domestic violence and knows that battering is extremely dangerous and can be lethal. Stalking occurs most frequently in the context of domestic violence where abusers attempt to locate women and their children in an effort to force them into returning to a relationship or to punish them for having left. When domestic violence survivors are able to flee they must be able to have their location kept confidential. Public access to personal information held by state departments of motor vehicles gravely jeopardizes safety attempts by battered women and their children. PCADV joins

this brief to assist this Court in its consideration of the critical issues of safety for battered women and children.

Physicians for Reproductive Choice and Health (PRCH) firmly supports the amicus brief supporting the constitutionality of the Driver's Privacy Protection Act (DPPA). PRCH is a national physician-led not-for-profit organization founded in 1992. We represent more than 1,800 physicians of various disciplines and more than 1,000 non-physician supporters. Our members are family practice physicians, obstetricians/ gynecologists, pediatricians, internists, adolescent medicine specialists, psychiatrists and others. The mission of PRCH is to enable concerned physicians to take a more active and visible role in support of voluntary universal reproductive health. PRCH is committed to ensuring that all people have the knowledge, equal access to quality services and freedom of choice to make their own reproductive health care decisions.

The ability to access personal information through license plate numbers directly impacts the safety of physicians, staff, volunteers and patients in facilities that provide abortions, as well as the families of these individuals. The DPPA might have helped to prevent the tragic 1994 murder of our colleague Dr. Bayard Britton whose identity was obtained from his license plate by anti-abortion extremists. One PRCH Board member, the late Dr. Elizabeth Karlin, spoke about her negative experiences with throngs of anti-choice protesters demonstrating outside of her home. Recently, the threat of anti-choice violence at private homes has become a harsh reality with the 1998 brutal murder of our member Dr. Barnett Slepian, a physician who was shot and killed in his kitchen in front of his wife and children.

The ability of fanatical extremists to obtain personal information such as the home addresses of physicians and patients also has a serious effect on the provision of women's reproductive health care in general. Physicians and staff under threat of personal attacks may choose not to provide and the current provider shortage (approximately 86% of all counties in the United States do not have an abortion provider) will only increase, leaving more women without access to essential health services. Additionally, the lack of privacy will inordinately influence women who fear for their personal safety not to seek needed health services. Therefore the Driver's Privacy Protection Act is necessary to protect the lives and rights of physicians and patients.

Planned Parenthood Federation of America, Inc. ("PPFA") a New York not for profit corporation, is the world's oldest and largest voluntary reproductive health care organization. PPFA provides leadership to 132 autonomous affiliates that manage 900 health centers in 47 states and the District of Columbia. PPFA is dedicated to the principle that every individual has a fundamental right to choose when or whether to have children, regardless of the individual's income, martial status, race, ethnicity, sexual orientation, age, national origin, or residence. Therefore, PPFA affiliates provide education and medical services to nearly five million women and men a year, including contraceptive services and counseling, cancer screening and evaluation, emergency contraception, HIV testing, infertility treatment, medical and surgical abortion, pregnancy testing and counseling, sexuality education, testing of sexually transmitted disease and infections, prenatal care and sterilization.

PPFA affiliates provide confidential medical services in an effort to provide a safe environment for patients to make

important decisions about their reproductive health care needs. On a daily basis, affiliate patients and employees are exposed to picketing and harassment from protestors, instilling fear in employees and affecting the ability of patients to make these important decisions. As the violence against and the harassment of patients and employees increases, PPFA recognizes the necessity of ensuring patient and employee confidentiality as part of its mission to provide reproductive health care services and advocate public policies, which guarantee access to these services.

STOPDV, Inc. is a national organization dedicated to protecting battered women and children from domestic violence. It has dealt with over 70,000 cases of stalking and domestic violence. STOPDV, Inc. joins this brief of amici curiae out of its belief that it is critical to the safety of battered women and stalking victims that their addresses are kept from those who would stalk and kill them and their family members. The Driver's Privacy Protection Act can be quite simply the difference between life and death for these people.

The Women's Law Project is a Philadelphia-based, not-for-profit women's legal advocacy organization founded in 1974 for the purpose of advancing women's legal, social, and economic status. The Law Project provides free telephone counseling to 8,000 callers a year on problems including domestic violence, child support and custody, divorce, employment discrimination, and welfare. The Law Project is counsel to sixty-six organizations serving domestic violence survivors who filed in amicus brief in Saenz v. Roe, 119 S.Ct.1518 (1999), and participates on the Pennsylvania Department of Public Welfare's Domestic Violence/TANF Task Force.

The Law Project also has litigated extensively on behalf of women's medical providers and patients. Its litigation docket has included such landmark reproductive rights cases as Planned Parenthood v. Casey, Elizabeth Blackwell Health Center for Women v. Knoll, Roe v. Operation Rescue, and Thornburgh v. American College of Obstetricians and Gynecologists. A number of its clients have experienced illegal, violent clinic blockades, arson, bomb threats, assaults, and death threats by anti-choice protestors, and several doctors providing abortion services in Pennsylvania have been repeatedly stalked and harassed at their homes. The Drivers' Privacy Protection Act is an important protection for these medical providers and for women subject to harassment, stalking and prior assault.

SUMMARY OF ARGUMENT

The Driver's Privacy Protection Act of 1994, Pub. L. No. 103-322, 108 Stat. 2099-2102, 18 U.S.C. §§2721-2725 (the "Act" or "DPPA"), prohibits state departments of motor vehicles, and their employees, from disclosing personal information about individuals without their consent. The Act is crucial to protecting women from stalking and violence. Indeed, the legislative history of the Act clearly documents a serious nationwide problem of women being stalked, assaulted, and at times murdered by individuals who obtained the women's home addresses from state departments of motor vehicles. See, e.g., Protecting Driver's Privacy, Hearings, Sub-committee on Civil and Constitutional Rights of House Judiciary Committee (1994) (testimony of David Beatty), 1994 WL 14168013; see also Cong. Rec. S15761-65

(November 16, 1993); Cong. Rec. H2522-24 (April 20, 1994).

The easiest, and sometimes the only way, in which stalkers can find their victims is through information from state departments of motor vehicles. The National Institute of Justice Report specifically recommends address confidentiality programs as a way of combatting stalking. Patricia Tjaden & Nancy Thoennes, Stalking in America: Findings from the National Violence Against Women Survey, National Institute of Justice, Centers for Disease Control and Prevention (April 1998) at 12. Experts on domestic violence also strongly express the need for address confidentiality. Women fleeing a violent, abusive relationship must keep their new locations secret; confidentiality of information possessed by departments of motor vehicles is thus crucial.

Moreover, the DPPA is important to protecting the right of women to have access to reproductive health care. Extremist anti-abortion groups are engaged in a national campaign of violence against health care professionals who work at facilities where abortions are performed and of harassment of women seeking abortions. Olga Rodriguez, Advocating the Use of California's Stalking Statute to Prosecute Radical Anti-Abortion Protestors, 7 Hastings Women's L.J. 151, 153-154 (1997). Doctors, nurses, and administrators have been stalked, assaulted, and some murdered. Such violence and harassment has a direct effect on women's right to abortion because it causes many professionals to resign in the face of threats and violence. See Jennifer Jackman, Christine Onyango & Elizabeth Gavrilles, 1998 National Clinic Violence Survey Report (1999),http//www.feminist.org/research/surveys/1998

/finaldraft.html.

The key way in which violent anti-abortion groups learn the home addresses of these health care professionals and their patients is through departments of motor vehicles. In fact, the publications and testimony of these extremist anti-abortion individuals and groups specifically describe how doctors can be stalked by copying their license numbers and then learning their home addresses via state departments of motor vehicles. See Florida Pro-Lifers ID Replacement for Gunn, Life Advocate, September 1993, at 19; Killer Clown Exposed, Life Advocate, October 1993, at 16.

Extremist anti-abortion groups have prepared "Wanted Posters," for health care professionals and volunteers, and threatening web sites for them as well as others including judges and legislators. See "Nuremberg Files," http://www.netfreedom.net/nuremberg/index.html. Personal information, such as home addresses and license plate numbers, are included. Id. This information is frequently obtained from state departments of motor vehicles. See Kevin Sherlock, "Operation Rescue of California, Presents Abortion Buster's Manual." Such a "Wanted Poster" was prepared against Dr. John Britton who was subsequently murdered by an anti-abortion extremist.

Congress unquestionably has the authority under both section five of the Fourteenth Amendment and its Commerce Clause power to prevent violations of rights by prohibiting state government action. Although the Tenth Amendment limits Congress' ability to compel legislative or regulatory activity by state governments, Printz v. United States, 521 U.S. 98 (1997), New York v. United States, 505 U.S. 144 (1992), this Court never has questioned Congress' authority

to prohibit state and local government actions that violate the rights of individuals.

This Court repeatedly has ruled that Congress, pursuant to section five of the Fourteenth Amendment, may adopt laws to prevent the violations of rights. Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank and United States, 119 S.Ct. ___ (1999), 1999 WL 412723 (June 23, 1999); City of Boerne v. Flores, 521 U.S. 507, 518-520 (1997). The Driver's Privacy Protection Act protects rights protected by the Fourteenth Amendment, including the right to privacy, Whalen v. Roe, 429 U.S. 589 (1977); the right to abortion, Planned Parenthood v. Casey, 505 U.S. 833 (1992), Roe v. Wade, 410 U.S. 113 (1973); the right to informational privacy for women seeking abortions, Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986), Reproductive Services, Inc. v. Walker, 439 U.S. 1307 (Brennan, Circuit Justice 1978); and the equal protection rights of women, United States v. Virginia, 116 S.Ct. 2264 (1996).

Moreover, the DPPA is a constitutional exercise of Congress' authority under its Commerce Clause power. This Court never has suggested that Congress, under its commerce clause authority, is limited in its ability to prohibit state government actions that endanger rights. In New York v. United States, 505 U.S. 144 (1992), and Printz v. United States, 521 U.S. 98 (1997), the Court held that Congress could not compel state governments to implement federal mandates. In both cases, this Court was concerned with Congress forcing states, at substantial cost, to regulate private behavior. Neither case involved Congress prohibiting states, at no regulatory cost or administrative burden whatsoever, from taking actions that endanger rights.

The Driver's Privacy Protection Act is a crucial federal law protecting women from violence and safeguarding women's constitutional right to abortion. The Act is in accord with countless federal laws, which have been upheld by this Court, that prohibit state conduct to prevent the violations of rights. Congress does not violate the Tenth Amendment when it prohibits state governments from acting in a manner that endangers the fundamental constitutional rights of women.

ARGUMENT

THE DRIVER'S PRIVACY PROTECTION ACT IS A CONSTITUTIONAL EXERCISE OF CONGRESS' POWER TO PROTECT AND ENFORCE THE RIGHTS OF WOMEN

A. The Driver's Privacy Protection Act Protects Women and Prevents Violation of Women's Rights

1. Privacy of information possessed by state departments of motor vehicles is crucial in protecting women from stalking and violence

The Driver's Privacy Protection Act of 1994, Pub. L. No. 103-322, 108 Stat. 2099-2102, 18 U.S.C. §§2721-2725, prohibits state departments of motor vehicles, and their employees, from disclosing personal information about individuals without their consent. The law was inspired by acts of violence against women and reproductive health care professionals who had been stalked and murdered by

individuals who learned their addresses through the use of information gained from state departments of motor vehicles.

Indeed, the legislative history of the Act documents the need to prevent violations of women's rights and particularly to prevent stalking and violence against women. Senator Barbara Boxer, a sponsor of the bill, spoke of how those "who move to escape an abusive relationship shouldn't have to choose between registering a car and maintaining their safety." Statement of Barbara Boxer, Driver's Privacy Protection Act (October 26, 1993), at 1. Senator Boxer mentioned several specific examples of women who were assaulted and murdered by assailants who learned the women's addresses through state departments of motor vehicles. Likewise, Senator John Warner, a co-sponsor of the bill spoke of how the "legislation is to protect a wide range of individuals" from the release of private information from state departments of motor vehicles. Cong.Rec. S15764 (Statement of Senator John Warner).

For example, throughout the legislative history of the Act, there is mention of the tragic stalking and murder of actress Rebecca Schaeffer. See, e.g., Protecting Driver's Privacy, Hearings, Subcommittee on Civil and Constitutional Rights of House Judiciary Committee (1994) (testimony of David Beatty), 1994 WL 14168013; see also Cong. Rec. S15761-65 (November 16, 1993); Cong. Rec. H2522-24 (April 20, 1994). Robert Bardo, a man who had been confined to mental institutions on several occasions, obtained Schaeffer's address through the California Department of Motor Vehicles. Having her address, he went to her apartment where he shot and killed her.

David Beatty, the Director of Public Affairs for the National Victims Center, testified at length before the House Judiciary Committee about the need for the law to protect women from violence. Mr. Beatty explained that "accessing government records is the most common way in which abusers find their victims once they've moved in an attempt to escape." Beatty Testimony, supra at 3.

Mr. Beatty described many instances of women who had been stalked and murdered by individuals who found them through the use of information from departments of motor vehicles. Id. at 4. He concluded that limiting access to information at state departments of motor vehicles "will not only reduce the likelihood of further harassment and violence but will actually save the lives of numerous innocent victims." Id. at 5.

There is a serious national problem with women being stalked and subjected to violence. The easiest way, and sometimes the only way, for a stalker to locate his victim is through information from state departments of motor vehicles. The report and recommendations of the National Institute of Justice and the Centers for Disease Control and Prevention, is authoritative and instructive. Patricia Tjaden & Nancy Thoennes, Stalking in America: Findings from the National Violence Against Women Survey, National Institute of Justice, Centers for Disease Control and Prevention (April 1998). The Report found that "[s]talking is more prevalent than previously thought: 8 percent of women and 2 percent of men have been stalked at some time in their life; an estimated 1,006,970 women and 370,990 men are stalked annually." Id. at 2.

The Report also found that most stalking victims are women. Specifically, it found that "[s]eventy-eight percent

of the stalking victims identified by the survey were women . . . and 87 percent of the stalkers identified by victims were male." Id. at 5.

The Report recommended "address confidentiality programs" as a way of combatting stalking. Id. at 12. The Report noted that stalking victims are urged to relocate and to secure a confidential mailing address. The Report expressly concluded: "Stalking intervention strategies should include address confidentiality programs. Survey data indicate that about a fifth of all stalking victims move to a new location to escape their stalker." Id. at 14. Restricting the release of information by state departments of motor vehicles obviously is crucial to ensuring address confidentiality.

Confidentiality of personal information, such as addresses, is particularly important for victims of domestic violence. In 1994, Congress found that domestic violence is the leading cause of injuries to women between the ages of 15 and 44. Violent Crime Control and Law Enforcement Act of 1994, H.R. Conf. Rep. No. 103-711, at 391 (1994). Nearly 30 percent of all murders of women are committed by husbands or boyfriends. Congressional Research Service Report for Congress, Violence Against Women: An Overview 5 (1994). One study found that "[a]t least 90 percent of battered women who are killed by their past or present lovers were known to have been stalked by them before being murdered." Joan Zorza, Recognizing and Protecting the Privacy and Constitutionality Needs of Battered Women, 29 Fam. L.Q. 273, 274 (1995).

A woman who is fleeing an abusive, violent relationship desperately needs to keep her new address secret. One commentator explained:

> "An abused woman must be able to keep her whereabouts confidential because many abusive and controlling men spend enormous amounts of time and effort spying on, seeking out, following, and harassing their victims. Such stalking behaviors can be especially lethal to the victims and children. Once her location is known to her abuser, he is very likely to go on battering her. And he may even kill her, and her children, as well. Given that most abusive men continue to search for and abuse their prior partners, for a battered woman to be safe, she has to able to keep any new address confidential."

Zorza, at 281. Congress has recognized this in other statutes as well, such as the provision of the Violence Against Women Act which provides for confidentiality of post office information. See 42 U.S.C. §14014 (requiring the United States Postal Service to protect the confidentiality of domestic violence shelters' and abused persons' addresses). See also 42 U.S.C. §14104 (providing for the preparation of a report on the confidentiality of victims' addresses).

Address confidentiality is truly a matter of life and death for many women. The DPPA is thus essential to safeguarding women and protecting them from stalking and acts of violence. The Act eliminates the ability of stalkers to gain their victim's addresses by simply paying a small fee to state departments of motor vehicles.

2. Privacy of information possessed by state department of motor vehicles is crucial in protecting women's constitutional right to reproductive choice by protecting health care professionals and patients from stalking and violence

The Act also is important in protecting women's rights in another way: it safeguards the privacy of doctors and health care personnel who perform abortions and the women who see these professionals for reproductive health care. As Senator Boxer stated upon introducing the Act, "doctors and nurses shouldn't have to worry about anti-abortion activists taking down their license plate numbers and then harassing and intimidating them and their families." Statement of Senator Barbara Boxer, Driver's Privacy Protection Act (October 26, 1993).

Extremist anti-abortion groups are engaged in a campaign of violence against health care facilities and professionals that perform abortions. One researcher found: "Anti-abortion extremists have increasingly resorted to aggressive and violent actions in an attempt to achieve their objectives. . . . After the first fatal attack on an abortion clinic in 1993, there have been seven murders [of doctors and clinic healthcare workers]." Olga Rodriguez, Advocating the Use of California's Stalking Statute to Prosecute Radical Anti-Abortion Protestors, 7 Hastings Women's L.J. 151, 153-154 (1997). The 1998 National Clinic Violence Survey found that 22.2% of clinics experienced one or more forms of severe violence including blockades, invasions, bomb threats and bombings, arson threats and arsons, chemical attacks, death threats, and stalking. Jennifer Jackman, Christine Onyango & Elizabeth

Gavrilles, 1998 National Clinic Violence Survey Report (1999), http//www.feminist.org/research/surveys/1998/finaldraft.html.

Extremist, violent anti-abortion protestors stalk, threaten, assault, and sometimes murder health care professionals who perform abortions. Rodriguez at 155. The 1998 Clinic Violence Survey found that 5.1% of clinics had experienced stalking and that 8.5% of clinics experienced home picketing. Jackman, et al, 1998 National Clinic Violence Survey Report.

Extremist anti-abortion groups have engaged in a concerted effort to track down doctors, staff, and patients through their license plate numbers. Indeed, anti-abortion groups have adopted an aggressive campaign of publicly identifying doctors and other health care personnel who work at facilities that perform abortions and publicizing their home addresses. Randall Terry, founder of the extremist group, Operation Rescue, initiated a "No Place to Hide Campaign," in which the faces of doctors were put on "Wanted Posters" that were placed around their residential neighborhoods. Rodriguez at 153. Other extremists also have circulated similar posters. The key to the targeting and stalking of these health care professionals is the ability of extremist anti-abortion protestors to learn home addresses of those who work at facilities that perform abortions. The easiest way, and sometimes the only way, to gain this information is through state departments of motor vehicles.

Indeed, the publications of these violent anti-abortion groups specifically describe how doctors can be stalked by copying their license numbers and then learning their home addresses via state departments of motor vehicles. See Florida Pro-Lifers ID Replacement for Gunn, Life Advocate,

September 1993, at 19; Killer Clown Exposed, Life Advocate, October 1993, at 16. Operation Rescue of California, in its "Abortion Buster's Manual," specifically stated that in many states it is possible "to trace abortionists' license plate numbers through your state's vehicle registration agency." Sherlock, "Operation Rescue of California Presents Abortion Buster's Manual." The Manual provided a detailed description of how to gain personal information about doctors and health care personnel from the departments of motor vehicles.

Some extremist anti-abortion groups have organized what they termed, "The Nuremberg Files," which they described as a project of "collecting dossiers on abortionists in anticipation that one day we may be able to hold them on trial for crimes against humanity." http://www.netfreedom.net/nuremberg/index.html. The Nuremberg Files website encourages the gathering of information against "persons who perform abortions (doctors, nurses, etc.), persons who own or direct abortion clinics, persons who provide protection to abortion clinics (security guards, escorts, law enforcement officers, etc.), and judges and politicians who pass or uphold laws authorizing child-killing or oppressing pro-life activists." Id.

The website claims that it wanted to gather "current and past personal data including date and place of birth, home and business addresses and phone numbers, Social Security numbers, [and] automobile license plate numbers." Id. All of this is information that was available from state departments of motor vehicles prior to the enactment of the Driver's Privacy Protection Act.

The information gained from license plate numbers is used to assault and even murder health care professionals

providing reproductive health services. The most poignant example of this is Dr. John Britton. Several anti-abortion extremists, including Paul Hill, went to great effort to determine the identity of the doctor who replaced Dr. David Gunn, who had been murdered the year before. One extremist finally obtained the doctor's license plate number (the doctor had purposefully tried to keep it hidden, insofar as was legal) and called it in to a cohort who "ran a check on the tag" and within ten minutes had secured Dr. Britton's identity. "Florida Pro-Lifers ID Replacement for Gunn," Life Advocate, September 1993. Extremists then prepared "wanted posters" against Dr. Britton titled, "Wanted for Crimes Against Humanity,"[2] and included the doctor's picture, home and work addresses, the description of his motor vehicle and its license plate number, as well as other information that was available from department of motor vehicle records. Subsequently, Paul Hill murdered Dr. Britton.

Extremist anti-abortion groups copy license plate numbers from cars leaving clinics and other facilities that provide reproductive health services. State departments of motor vehicles are then used to identify the individuals and to provide personal data, include home addresses, of health care professionals and patients. In a deposition, anti-abortion extremist Meredith T. Raney, Jr., described copying license plate numbers at facilities in Florida and then getting

[2]A similar "wanted poster" against another doctor and the "Nuremberg Files" website, supra, were found by a jury to be true threats not protected by the First Amendment in Planned Parenthood et al v. ACLA et al, No. 95-1671-JO (D. Ore. 1999).

addresses from the Florida Department of Transportation. Aware Woman Center for Choice, Inc. v. Raney, (M.D.Fla. No. 99-05) (Deposition of Meredith T. Raney, Jr.) at 32-33.

Patients as well as health care professionals are targeted. One group announced what it called, "Operation Goliath," and its formal press release stated: "We are starting to have our volunteers take down the license plate number or anyone that they are not able to give literature to. We then trace their license number through legal means, and obtain their name and address." "For Immediate Release: Pro-Life Group Announces New Tactics."

The violence directed at health care professionals directly threatens the ability of women to exercise their right to abortion. Indeed, Attorney General Janet Reno has spoken of a nationwide conspiracy to impede access to abortions. James Risen, Social Issues: Abortion Clinic Attacks Cast Glare on New Group of Extremists, L.A. Times (January 17, 1995), at A5. One expert noted that "[h]arassment and intimidation may dissuade skilled clinicians from entering this field, or convince them to quit." David A. Grimes, Clinicians Who Provide Abortions, 80 Obstetrics and Gynecology 719, 721 (1992). The stalking and targeting of health care professionals has resulted in many resigning. In 1998, 4.8% of clinics lost staff as a result of anti-abortion violence. Jackman et al, 1998 National Clinic Violence Survey Report (1999), http//www.feminist.org/research/surveys/1998/finaldraft.html. Of the clinics reporting violence-related staff resignations, 11.8% lost a physician, 52.9% lost nurses, 35.3% lost administrators, 11.8% lost counselors, and 5.9% had lab technicians resign. Id.

This campaign of violence against health care providers directly impedes the ability of women to exercise their constitutional right to make reproductive choices. Today, 86% of American counties have no abortion provider, a 14% drop from 1992. Stanley K. Henshaw, Abortion Incidence and Services in the United States 1995-1996, 30 Family Planning Perspectives 263 (1998).

Women exercising their constitutional right to obtain an abortion require the assistance of doctors and health care professionals. Stalking and violence against those working at health care facilities that perform abortions directly threaten this constitutional right. The DPPA is crucial in protecting the secrecy of personal information concerning these health care professionals and limiting the ability of extremist anti-abortion groups to engage in stalking and acts of violence.

B. Congress Has the Authority to Protect and Enforce the Rights of Women By Prohibiting State Conduct

Although the Tenth Amendment limits Congress' ability to compel legislative or regulatory activity by state governments, Printz v. United States, 521 U.S. 98 (1997), New York v. United States, 505 U.S. 144 (1992), there is no doubt that Congress can prohibit state and local government actions that violate the rights of individuals. Federal civil rights statutes, such as 18 U.S.C. §241 and 42 U.S.C. §1983, prevent violations of rights by those acting under color of state law. The Voting Rights Act of 1965, 42 U.S.C. §1973 et. seq., directly regulates state governments. This Court, of course, never has expressed doubt as to the constitutionality of such

laws, even though they are directed at prohibiting state and local government conduct.

Moreover, Congress is not limited solely to providing remedies for violations of rights. This Court repeatedly has ruled that Congress, pursuant to section five of the Fourteenth Amendment may adopt laws to prevent the violations of rights. Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank and United States, 119 S.Ct. ___ (1999), 1999 WL 412723 (June 23, 1999); City of Boerne v. Flores, 521 U.S. 507, 518-520 (1997).

The Driver's Privacy Protection Act enforces rights protected by the Fourteenth Amendment, including the right to privacy, Whalen v. Roe, 429 U.S. 589 (1977); the right to abortion, Planned Parenthood v. Casey, 505 U.S. 833 (1992), Roe v. Wade, 410 U.S. 113 (1973); the right to informational privacy for women seeking abortions, Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 766-67 (1986), Reproductive Services, Inc. v. Walker, 439 U.S. 1307, 1308 (Brennan, Circuit Justice 1978); and the equal protection rights of women, United States v. Virginia, 116 S.Ct. 2264 (1996). The legislative history of the Act documents a pattern of violations of each of these constitutionally protected rights, justifying the authority of Congress to enact the law pursuant to section five of the Fourteenth Amendment.

Also, this Court never has suggested that Congress, under its commerce clause authority, is limited in its ability to prohibit state government actions that endanger rights. In New York v. United States, 505 U.S. 144 (1992), and Printz v. United States, 521 U.S. 98 (1997), the Court held that Congress could not compel state governments to implement federal mandates. However, neither case restricted Congress'

authority to prevent state and local actions that could result in violations of rights. In both cases, this Court was concerned with Congress forcing states, at substantial cost, to regulate private behavior. Neither case involved Congress prohibiting states, at no regulatory cost or administrative burden whatsoever, from taking actions that endanger rights.

Indeed, this Court has expressly upheld federal laws that prohibit state government actions, even though it has invalidated laws compelling such actions. In South Carolina v. Baker, 485 U.S. 505 (1988), this Court rejected a Tenth Amendment challenge to the Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. 97-248, 96 Stat. 324, 26 U.S.C. §310(b)(1), which required states to issue bonds in registered form. The law prohibited the issuance of bearer bonds by state governments, and this Court upheld its constitutionality, declaring: "Any federal regulation demands compliance. That a State wishing to engage in certain activity must take administrative and sometimes legislative action to comply with federal standards regulating that activity is a commonplace that presents no constitutional defect." 485 U.S. at 514-15.

The DPPA prevents the interstate commercial flow of information obtained from departments of motor vehicles and thus is very much within the scope of Congress' Commerce Clause authority. See Travis v. Reno, 163 F.3d 1000 (7th Cir. 1998); State of Oklahoma v. United States, 161 F.3d 1266 (10th Cir. 1998) (upholding the constitutionality of the Act). Senator Boxer, the sponsor of the bill, expressly linked the need to prevent stalking and violence to Congress' authority to regulate interstate commerce. Senator Boxer explained that "with mail, cars, and harassment involved, this issue clearly has an impact on interstate commerce. As such -- under

Article I, section 8 -- this area is well within Congress' authority to regulate. We all understand that interstate commerce is severely threatened when mail is used, when people are scared to drive in their cars, when their civil rights are violated and then they live in fear of being harassed and stalked." Violent Crime Control and Law Enforcement Act of 1993 Congressional Record S156707 (November 16, 1993).

The DPPA directly regulates commercial activity by state governments in prohibiting the selling of information by departments of motor vehicles. It is estimated that New York's motor vehicle department earned $17 million in one year by selling driver records. Court to Hear Privacy Cases, Washington Post (May 18, 1999) at A-1; see also "U.S. Helped Fund License Photo Database," Washington Post (February 18, 1999), at A1 (describing sales of motor vehicle photos by state governments to a company seeking to compile a national data base). Thus, the DPPA directly regulates a commercial activity, as state departments of motor vehicles are profiting at the expense of women's safety and women's rights.

Also, the law regulates activities that have a substantial effect on interstate commerce in that information from departments of motor vehicles is used for stalking of women and harassment of providers of reproductive health services. The Act is thus a constitutional exercise of Congress' authority under the commerce clause. See United States v. Lopez, 514 U.S. 549 (1995).

This Court has made it clear that Congress may use its Commerce Clause power to protect civil rights. See, e.g., Katzenbach v. McClung, 379 U.S. 294 (1964); Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964)

(upholding the constitutionality of the 1964 Civil Rights Act as a permissible exercise of Congress' commerce clause authority).

The Fourth Circuit was incorrect in its premise that the DPPA regulates state agencies and ignores private actors. The Act regulates all who are involved in the licensing, registration, and record dissemination process. For example, §2721(a) addresses DMV employees, as well as independent "contractors." Section 2721(c) regulates resale or redisclosure, which do not involve state employees at all, only private entities. Section 2722 prohibits "additional unlawful acts" committed by "any person," not just state employees. Federal fines and civil causes of action may accrue against any responsible person, private or public, not only State actors. §§2723, 2724.

Simply put, Congress has the authority, under both section five of the Fourteenth Amendment and the Commerce Clause, to enact laws to prevent the violations of rights. The Driver's Privacy Protection Act is crucial to safeguarding the rights of women to be free from stalking and violence and to having access to abortion and other medical services. The Tenth Amendment is not violated by this federal law that imposes virtually no burden on state governments and prohibits states from acting in a manner that endangers the rights of women.

Conclusion

For these reasons, amici curiae urge this Court to reverse the Fourth Circuit and uphold the constitutionality of the Driver's Privacy Protection Act.

Respectfully submitted,

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No. 98-1464

Supreme Court of the United States
October Term, 1998

JANET RENO, *ATTORNEY GENERAL OF THE UNITED STATES, Petitioner,*

-versus-

CHARLIE CONDON, *ATTORNEY GENERAL OF SOUTH CAROLINA, Respondent.*

On Writ of Certiorari to the US Court of Appeals, for the Fourth Circuit

BRIEF OF AMICI CURIAE IN SUPPORT OF THE UNITED STATES:

SCREEN ACTORS GUILD
RICHARD MASUR, PRESIDENT
GAVIN DE BECKER
CONGRESSMAN JAMES P. MORAN
ESTATE OF JOHN BRITTON, M.D.

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QUESTIONS PRESENTED

Amici present these Questions as appropriate for resolving this case, and encompassed by the grant of certiorari.

I. Whether Congress, Under the Commerce Clause, May Protect Citizens from Unconsented Disclosure of Private Identifying Information by State Agencies, Where Such Disclosure Is Not Substantially Related to Legitimate Agency Functions, and Materially Facilitates Stalking, Threats, and Harassment?

II. Whether Congress, Under the Privileges and Immunities Safeguards, May Protect Citizens from Unconsented Disclosure of Private dentifying Information by State Agencies, Where Such Disclosure Is Not Substantially Related to Legitimate Agency Functions, and Materially Impedes the Exercise of Rights of Citizenship?

III. Whether Congress, Under Section 5, Amendment XIV, May Protect Citizens from Unconsented Disclosure of Private Identifying Information by State Agencies, Where Such Disclosure Is Not Substantially Related to Legitimate Agency Functions, and Materially Facilitates Deprivations of Recognized Life, Liberty, and Privacy Interests?

AMICI CURIAE ON THE BRIEF

These friends of the Court are individuals and organizations interested in protecting the invaluable safety, security, lives, and privacy of Americans through the national Drivers' Privacy Protection Act, 18 USC §2721, {DPPA} at issue, additional federal and State privacy legislation, and other lawful means:

The Screen Actors Guild is interested in the privacy and safety of members, and all citizens. While public officials often have special laws shielding their private information from public disclosure, other high profile individuals are always at risk. The avoidable early death of actress Rebecca Schaeffer is but one example among many.

Amicus Gavin de Becker is a national authority and consultant on security and prevention of violence. He is the author of THE GIFT OF FEAR, cited in the brief.

Congressman James P. Moran was principal sponsor in the House of the Act of Congress at issue. He is quoted in the brief.

The Estate of John Britton has authorized amicus participation. On August 6, 1993, stalkers copied Dr Britton's license plate outside of Pensacola, Florida. They identified him and issued a "wanted poster" with his

addresses, phone numbers, and other identifying information. One Paul Hill subsequently tracked Dr Britton and shot him in the head. *See* J Risen & J Thomas, WRATH OF ANGELS pp 349, 362-64 (1998).

The DPPA legislation also received support from the following organizations as it passed through Congress:

American Medical Ass'n, Cong Rec S15764 (11/16/93);
American Insurance Ass'n, *Id*;
Consumer Federation of America, *Id*; and
Fraternal Order of Police, *Id*.

{Notes per S Ct Rule 37:

Both the United States and the State of South Carolina consented in writing to the filing of this brief of amici curiae.

Counsel Lucas prepared the brief in its entirety in Bookman Old Style font on Word 97/Windows 98, as a *pro bono* project of the unincorporated association "Private Citizen," an entity interested in securing the privacy and security of all Americans and their families.}

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STATEMENT OF THE CASE

The path to this legislation began when an unknown person clandestinely copied the vehicle license plate of a stranger. The copier took the plate number to a State DMV, or an Internet source such as CompuServe or TML, paid a fee, and received in return the name, address, SSN, description, and other data on the unsuspecting vehicle owner. This transformed the plate into a *de facto* billboard. Unwanted contact and harassment ensued.

The DMV and Internet provider feigned innocence, when confronted about the chain of escalating events. Such providers, however, are indispensable links in the disclosure, stalking, and violence. *See* J Rothfeder, PRIVACY FOR SALE (1992).

After highly publicized slayings, and stabbings, facilitated by unconsented DMV disclosures, Congress became concerned. The Rebecca Schaeffer murder heightened public awareness. Cong Rec S15761-65 (11/16/93), H2522-24 (4/20/94).

The pattern has been widespread. It burdens commerce, individual lives, personal safety, security, and privacy. The nonprofit National Victim Center "estimates that up to two hundred thousand people are being stalked in this country at any moment, and that one out of every twenty women will be the target of a stalker at some point in her life." John Douglas, OBSESSION p 224

(1998). Congress ultimately passed DPPA, as 18 USC §§2721-2725, effective 9/97.

Mass marketers, intrusive-niche Internet special interests, and a few States dissented. Prior to DPPA, for example, the New York DMV grossed $17 million in one year from trafficking in vehicle/driver records. Statement of J Goldman to Congress. 1994 WL 212813 (2/3/94).

Congressional history is informative. As Virginia Representative James Moran stated to the House, "[v]ery few people realize that anybody can write down the license plate number of your spouse and daughter and find out where they live and their name and their social security number ...." Cong Rec H2522 (4/20/94). Stalkers could, with DMV and Internet complicity, breach personal security in 34 States before DPPA.

Senator John Warner co-sponsored the bill "to protect the privacy and safety of all Americans — not just the VIP's with special clout." Cong Rec S15763 (11/16/93).

Senators Boxer and Harkin told of burglary gangs that targeted expensive cars, using license plates and DMVs as silent well-paid accessories. *Id* at S15762, S15766.

Prior to DPPA, sophisticated felons with laptop computers could orchestrate a crime wave from the parking lot of an upper echelon restaurant. Some DMVs place names, addresses, and often telephone numbers, Online, for anyone with a PC/ modem.

One serial killer in Maryland was able to identify female victims entering restaurants, run a quick license plate check, page them {"Your lights are on!"}, then abduct, handcuff, and assault. Five license plates. Five women dead. *See* John Douglas, MIND HUNTER p 28 (1995).

Major clinical studies suggest that "an estimated 1 million adult women and 0.4 million adult men are stalked annually in the United States." J Reid Meloy, PhD (ed), PSYCHOLOGY OF STALKING: Clinical and Forensic Perspectives p 3 (1998). *Cyberstalking* is a dangerous growth industry with major negative impact on citizens' lives, safety, and privacy. *Id* at p 10.

Not all stalkers are so benign as the person who sought "... owners ... she claimed were stealing the fillings from her teeth at night." Cong Rec H2522 (4/20/94). Others are violence-prone, afflicted with obsessive-compulsive and manic depressive disorders. Meloy, *supra,* is an entire clinical text on the subject. Stalkers assault a measurable, finite number of citizens annually through license plate tracking. DPPA is one vital legislative step toward reducing this tragic statistic.

Amici, as citizens, respectfully urge the Court to uphold Congress, the Solicitor General, the Seventh, and the Tenth Circuits. Amici offer further compelling constitutional reasons for reversal.

ARGUMENT

I. Congress May, Under the Commerce Clause, Protect Citizens from Unconsented Disclosure of Private Identifying Information by State Agencies, Where Such Disclosure Is Not Substantially Related to Legitimate Agency Functions, and Materially Facilitates Stalking, Threats to Life & Security, and Harassment.

DPPA & Commerce

Amici represent drivers and passengers at risk traveling in interstate commerce. States coercively mandate that all vehicles be registered. Requirements vary, but include involuntary disclosure of personal information such as full name, address, photograph, telephone number, SSN, and identifying physical characteristics.

If disclosure were utilized solely for limited public motor vehicle necessities, a DMV could do little harm. However, State agencies prior to DPPA regularly sold detailed personal profiles without consent, in interstate commerce, to anyone with a scintilla of apparent sanity or legitimacy.

Stalkers can and do compile vast dossiers on targeted classes of strangers. Most notorious are the "Nuremberg Files" of persons in reproductive health care. www.christiangallery.com. The list also targets some members of *this Court*.

It now is mirrored in the Netherlands. www.xs4all.nl/~oracle/nuremberg/gate.html.

The DMV transactions involved here do not relate at all to driver or vehicular safety. Instead, they are DMV revenue enterprises, extracting then selling names and addresses.

Unsuspecting citizens with vehicles are seriously burdened, indeed *set up* to be victims of crime, by this reckless trafficking in their names and addresses. Amici cannot stop driving. Nor can we all be surrounded by Secret Service or US Marshals.

Stalkers and harassers regularly travel in interstate commerce to surveil their victims. The Rebecca Schaeffer killer crossed State lines. The man who repeatedly stabbed Theresa Saldana came all the way from Scotland. *See* Meloy, *supra,* p 26; Gavin DeBecker, GIFT OF FEAR p 290 (1997).

Intelligence gathering by stalkers is greatly facilitated by open access to motor vehicle records. Enterprise DMVs and niche Internet providers regularly trade in that commerce of privacy and security.

Article I, Section 8 of the Constitution empowers Congress to "regulate Commerce ... among the several States ... [and to] make all Laws which shall be necessary and proper for carrying into Execution ... [all] Powers vested by this Constitution ...." The bipartisan proponents of DPPA relied in part

on the commerce clause: "[I]nterstate commerce is severely threatened when mail is used, when people are scared to drive in their cars, when their civil rights are violated, and when they live in fear of being harassed and stalked." Co-sponsor Senator Boxer, Cong Rec S15763 (11/16/93).

That reliance is amply supported in the case law. As Chief Judge Posner has stated: "The boycott of a single opthalmological surgeon was held in *Summit Health v Pinhas,* 500 US 322, 329-30 (1991), to be within the power of Congress to prevent ...." *United States v Soderna,* 82 F3d 1370, 1373 (7th Cir 1996). Here there is much more.

DPPA responds to a fundamentally interstate problem caused by reckless State motor vehicle registration and driver licensure practices. Moreover, DPPA seeks to curtail some interstate trafficking in personal security and privacy, to protect the large class of citizens who must travel and use registered vehicles. All citizens are affected, as are our families and children.

No Tenth Amendment Transgression

Amendment X declares: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

As suggested above, DPPA rests squarely within the regulatory commerce powers delegated to Congress. DPPA is a reasonable step toward protecting drivers, owners, and their families who use vehicles in commerce.

"[T]he Tenth Amendment 'states but a truism that all is retained which has not been surrendered.' *United States v Darby,* 312 US 100, 124 (1941)." *Oklahoma v United States,* 161 F3d 1266, 1269 (10th Cir 1998)(upholding DPPA). It should follow that no Tenth Amendment inquiry arises at all where the regulatory impact on a State is no more than minimally necessary, and States are not mandated to enforce the penalties of the law. Here, as in *Baker,* the "well-supported conclusion that ... [DPPA] has had a *de minimis* impact on the States should end, rather than begin, the Court's constitutional inquiry." *South Carolina v Baker,* 485 US 505, 529 (1988)(Chief Justice Rehnquist, concurring).

However, the Fourth Circuit embarked on a different path, not apparent from the constitutional text or prior decisions of this Court. Amici will address those concerns.

<u>No Conscription of State Agencies</u>

DPPA imposes no more burdens on States than numerous other important national regulations or obligations of nondiscrimination and nonabridgment of

fundamental rights. A law student intern could prepare in short order a minimalist one page DMV form, a simple checklist application for persons seeking DMV record details, consistent with DPPA. Such a form would be far less complex than the daily State agency paperwork necessitated by innumerable federal regulations applied to state agencies, as in *South Carolina v Baker,* 485 US 505 (1988), *EEOC v Wyoming,* 460 US 226 (1983), and *Garcia v San Antonio Metro,* 469 US 528 (1985).

Basic drivers' license applications and emissions tests are much more complex than what DPPA minimally requires. Yet, they are a daily routine. The suggestion that DDPA unreasonably burdens the State DMV cannot withstand reasoned analysis in the context of day-to-day DMV operations. Surely, a minimal federal requirement for a one-page form satisfying DPPA does not seriously undermine federalism or the Tenth Amendment. This minimal federal overlay upon State DMVs, for the sake of commerce and citizen safety, does not impermissibly alter our "constitutional structure ...." *South Carolina v Baker,* 485 US 505, 528 (1988)(Justice Scalia, concurring).

It is no answer to critique DPPA as Swiss cheese, with its general prohibition, followed by fourteen (14) exceptions. Congress may reasonably determine that fourteen exceptions are needed, from tow trucks to

other agency requests, each with different degrees of justification. The information seeker can produce an I.D. and check the applicable boxes without threatening the federal system of the Founders.

No Singling Out of State for Regulation

DPPA was fundamentally misunderstood by the Fourth Circuit suggestion that it impermissibly regulates State agencies and ignores private actors. DPPA reaches *everyone* involved in the licensing, registration, and record dissemination process. This includes DMV staff, record requesters, Internet retailers, and resellers. All enforcement of DPPA is federal. There is no compulsion on a State to establish a regulatory or enforcement mechanism. States may choose to do so to reduce the stalking problem for their own citizens.

Section 2721(a) addresses DMV employees, as well as private independent "contractors," such as CompuServe. Section 2721(c) regulates resale or redisclosure, which do not involve State employees at all, only private entities.

"Additional unlawful acts," §2722, are proscribed when committed by "any person," not just State employees. Federal fines and civil causes of action may accrue against any responsible person, private or public, not only State actors. §§2723, 2724. The known pending private remedy DPPA actions are all

federal. None sue DMVs. Two seek redress from individual stalkers and Internet providers such as CompuServe, Inc., and TML Services, Inc. *See, e.g., AWCC v Raney,* 99-05-CV-ORL (MD Fla, filed 1/4/99); *Manhattan Magnolia Corp v Unterberger,* 99-8164-CV-WPB (SD Fla, filed 3/4/99).

A careful reading of DPPA shows it is evenhanded with the States. DMVs do presently occupy the field of vehicle registration and driver licensure. However, there is much less federal regulation of this State monopoly than with alcohol, tobacco, health, safety, and environmental matters.

Arguments along the above lines by the Fourth and Eleventh Circuits are readily answered and unpersuasive. DPPA does not raise serious, substantial Tenth Amendment concerns. The analyses of the Seventh and Tenth Circuits are far more reasonable, inclusive, and compelling. *Travis v Reno,* 163 F3d 1000 (7th Cir 1998); *Oklahoma v United States,* 161 F3d 1266 (10th Cir 1998).

II. Congress May, Under the Privileges and Immunities Safeguards, Protect Citizens from Unconsented Disclosure of Private Identifying Information by State Agencies, Where Such Disclosure Is Not Substantially Related to Legitimate Agency Functions, and Materially Impedes the Exercise Of Rights Of Citizenship.

Amendment XIV and a century of federal constitutional jurisprudence protect "the privileges or immunities of citizens of the United States ... [and their] life, liberty, or property" as well as the right to "equal protection of the laws." DPPA is appropriate to remedy serious problems that pertain both to commerce & travel, and citizen safety, security & privacy rights.

<u>Privileges, Immunities, Travel & Vehicles</u>

DPPA affects and protects vehicle drivers, passengers, and families. They travel inter- and intrastate, in vehicles that come annually from a major sector of the national and international economy.

States require both vehicle and driver licensure as a condition to motorized travel. States mandate that plates be visible to all, not hidden from potential stalkers. Yet plates are very easy for stalkers to copy, particularly with binoculars or a zoom lens.

Without DPPA protection, plates become a public dossier with directions into the sanctity of every vehicle owner's home.

This kind of State sanctioned exposure to unwanted contact heavily burdens a citizen's right to "... travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement.'" *Saenz v Roe*, — US —, — (1999).

This Court recently revisited the contours of the citizen's right to travel in *Saenz, supra.* That right in several dimensions "is firmly imbedded in our jurisprudence. *United States v Guest,* 383 US 745, 757 (1966), ... [and] 'assertable against private interference as well as governmental action ... a virtually unconditional personal right, guaranteed by the Constitution to us all.'" (Slip Op at 8).

Without DPPA enforcement, however, citizens in 34 States could not drive registered vehicles without risking that a stalker could copy their plates, and do harm. The burden on a citizen's interest in travel is substantial and direct. It has been in many States a daily Sword of Damocles, particularly for persons being stalked.

Congress may fully protect the privileged right to travel through both the commerce clause and Section 5, Amendment XIV affirmative powers. DPPA may be persuasively sustained on this concurring constitutional ground.

States cannot show a narrowly drawn, compelling justification for broadly disseminating private information coercively derived from license plate and driver's license applications. There is no rational connection to motor vehicle or traffic safety. States have scarcely attempted to justify their practices in the lower courts, relying instead upon the strained Tenth Amendment

argument to maintain this lucrative source of revenue.

The State practices condemned by Congress are not narrowly confined to State motor vehicle and traffic safety issues. Drivers with perfect records and well-inspected cars still are coerced to give up names, addresses, photographs, often telephone numbers, and more, to the casual inquirer at DMV, then to the world.

The class of drivers, and the class of record seekers, moreover, are both far too broad, indeed all encompassing. All drivers could be exposed to inquiries from all record seekers, prior to DPPA, dependent upon shifting State policies. There was no focus on limiting name disclosure to meet vital motor vehicle and safety needs, or anything directly relevant to the purpose of vehicle registration in the first place. A curiosity seeker could readily obtain names and addresses to seek out suspected witches whose plates contained an "X".

The States can put forth only a "virtually non-existent ... public interest in disclosure ...." *Compare United States v FLRA*, 510 US 487 (1994)(Justice Thomas, for the Court).

Nor does any State fiscal interest override that of Congress in protecting the travel privilege. These are not pre-existing State DMV treasury funds. While States may generate many dollars from sweeping unconsented sales of driver mailing lists,

those moneys are not of the State treasury. They derive from a virtual auction of drivers' security and privacy, coercively burdening the citizen's travel privilege itself. The driver must pay for a license plate needed to exercise the travel privilege. Then the State sells the driver's profile to high bidders, for any reason, without consent, discretion, or compensation. The license plate becomes an invitation for stalker access, a set of directions to the vehicle owner's home.

Congress may justify DPPA as appropriate legislation to protect the privilege of interstate vehicular travel from dangerous and intrusive State burdens.

III. Congress May, Under Section 5, Amendment XIV, Protect Citizens from Unconsented Disclosure of Private Identifying Information by State Agencies, Where Such Disclosure Is Not Substantially Related to Legitimate Agency Functions, and Materially Facilitates Deprivations of Recognized Life, Liberty, Security and Privacy Interests.

Life, Liberty, Security & Privacy

Amendment XIV protects not only the travel privilege, but also additional fundamental citizen rights. Congress may support DPPA as a national measure to protect drivers in commerce from

unreasonable risks to their lives, security, and privacy, much like numerous other kinds of highway safety and home privacy measures. DPPA will prevent a measurable number of home invasions, and save drivers' and passengers' lives, perhaps as many as saved by seatbelts and airbags, or even more.

DPPA most assuredly deters stalkers from finding and approaching the private homes of innumerable citizens. Congress may draw on the history cited by Chief Justice Rehnquist to justify that positive legislative purpose: "In 1604, an English court made the now-famous observation that 'the house of everyone is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose.' *Semayne's Case,* 77 Eng Rep. 194, 5 Co. Rep. 91a, 91b, 195 (K.B.)." *Wilson v Layne,* — US —, — (1999)(Slip Op p 5). Unconsented publication of name and address reduces repose and adds unnecessary danger to life and liberty.

Similarly, Congress may ratify the concerns of Justice Kennedy and others that: "Security of the home must be guarded by the law in a world where privacy is diminished by enhanced surveillance and sophisticated communication systems." *Minnesota v Carter,* 142 L Ed 2d 373, 386 (1998)(concurring opinion).

Further, Congress may recognize with DPPA the same kinds of privacy interests protected by FOIA. This encompasses "the

interest that individuals have in preventing at least some unsolicited, unwanted mail ..." [and] " avoiding ... telephone calls or visits, that would follow disclosure." *Compare United States v FLRA,* 510 US 487 (1994)(Justice Thomas, for the Court).

Nothing is unclear or unusual about legislating to protect the security of citizens' homes from public or private invasion. Nor are restrictions on reckless disclosures from ostensibly "public" records inappropriate, where vital citizen interests in life, safety, security and privacy exist.

Record Confidentiality

The closest cases on public record confidentiality and privacy are *United States v Ray,* 502 US 164 (1991), *United States v FLRA,* 510 US (1994), and *Whalen v Roe,* 429 U.S. 589 (1977).

The federal FOIA as construed in *United States v Ray* is instructive. 502 US 164 (1991). Haitians seeking refuge there requested FOIA access to the names of others previously returned. This Court denied that confidential information on privacy grounds.

FOIA Exemption 6 protects "medical files and similar files [to avoid] . . . a clearly unwarranted invasion of privacy." 5 USC §552(b)(6). The Court, per Justice Stevens, found the individuals' "privacy interest ... substantial ...." 502 US at 15: "Disclosure of

. . . identities could subject them or their families to 'embarrassment in their social and community relationships.'" 502 U.S. at 176. Embarrassment is a minor fear in the DPPA stalking context.

Congress has analogous power to protect drivers of vehicles from even more risky State DMV disclosures. A stalker's interest in record access is much weaker than that in *Ray*. Stalkers have no legitimate reason to contact unconsenting drivers, passengers or family. Access actually *creates* a serious safety hazard to citizens.

Paraphrasing this Court in *Ray,* DPPA protects personal information in DMV files to avoid a clearly unwarranted invasion of privacy. That privacy interest, safety and security from strangers, is substantial. Disclosure of identity and address subjects drivers and their families to much more danger than mere social embarrassment.

In line with *Ray,* more recently, this Court protected home addresses from FOIA disclosure in *United States v FLRA,* 510 US 487 (1994). Justice Thomas explained the connection between record disclosure and home security: "We are reluctant to disparage the privacy of the home, which is accorded special consideration in our Constitution, laws, and traditions."

Again, the privacy interest protected by Congress in *FLRA* was not at all so weighty as the case here with DPPA, where safety and

security are at stake, as opposed to unwanted trade union solicitations.

Whalen v Roe, 429 US 589 (1977), also has been applied for over twenty years to protect significant personal interests in medical and compulsory record confidentiality. Important cases in the Circuits applying *Whalen* make up a major body of American privacy law. *E.g., Fadjo v Coon,* 633 F2d 1172, 1175 (5th Cir 1981); *United States v Westinghouse,* 638 F2d 570, 578 (3d Cir 1980); *Greidinger v Davis,* 988 F2d 1344 (4th Cir 1993).

Whalen identified two protected federal constitutional interests: "One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." 429 US at 599-600.

Both such interests are unreasonably invaded by State DMVs in identifying and exposing citizens who are compelled to register their vehicles in order to travel freely. Unlike the secure database in *Whalen*, DMV records are a sieve, a storefront for sale. When a citizen travels, s/he is exercising a constitutional right. When moving by vehicle, however, the license plate must be visible. Without DPPA protection, it becomes a dossier for sale by the State. A citizen who travels should not be later confronted by an unpredictable stranger-zealot, writing, calling, or knocking on the

door at night. The license plate, DMV, and Internet niche purveyors combine to make that dangerous assault possible. This intimidating imposition upon citizens is threatening, and an undue burden upon private travel, safety, security, and the sanctity of one's home, castle, and family.

Whalen v Roe applies here to sustain DPPA. The interests asserted by Congress and private citizens through DPPA are stronger than those of that Roe, who had the protection of numerous safeguards. Congress may validly protect both kinds of interests recognized in *Whalen*: non-disclosure, and fundamentally important choices, to travel without fear, to be secure in one's home.

State disclosure interests, by contrast, may be limited to motor vehicle and traffic safety matters without widespread public dissemination. Broad Internet niche and stalker interests are not legitimate at all. They profit by acquiring and reselling an unconsenting individual's privacy and security. This contributes to serious foreseeable danger to many lives.

Whalen Part IV envisions this case. These rights go back to Justice Brandeis' classic statement that "the right to be let alone" is "the right most valued by civilized men [and women]." *Olmstead v United States,* 277 US 438, 478 (1928).

CONCLUSIONS

For the reasons set out this Court should uphold DPPA, 18 USC §§2721-2725, as constitutional, and reverse the judgment of the Fourth Circuit below. The Court should also approve the appropriate dispositions of the Seventh and Tenth Circuits in *Travis v Reno,* 163 F3d 1000 (7th Cir 1998), and *Oklahoma v United States,* 161 F3d 1266 (10th Cir 1998), and disapprove the error of the Eleventh Circuit in *Pryor v Reno,* 171 F3d 1281 (11th Cir 1999).

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No. 98-1464

In the

Supreme Court of the United States

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CHARLIE CONDON, ATTORNEY GENERAL FOR THE STATE OF SOUTH CAROLINA, ET AL.
Respondents,

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF *AMICI CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, THE AMERICAN SOCIETY OF NEWSPAPER EDITORS AND THE SOCIETY OF PROFESSIONAL JOURNALISTS IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Journalists depend on the First Amendment, state open records law, and the federal Freedom of Information Act

[1] Pursuant to Sup. Ct. R. 37.6, counsel for *amici curiae* authored this brief in total with no assistance from the parties. Additionally, no individuals or organizations other than the *amici* made a monetary contribution to the preparation and submission of this brief. Written consent of all parties to the filing of the brief *amici curiae* has been filed with the Clerk pursuant to Sup. Ct. R. 37.3(a).

(FOI Act) to obtain information from and about government agencies. The media in turn provide the public with information that allows public participation in self-government. Journalists also depend on primary source material contained in government databases, such as names, addresses, and telephone numbers, as an indispensable resource for investigative reporting. In the case at hand, the federal government contends that it may constitutionally restrict access to formerly public information contained in state motor vehicle records in order to protect drivers' privacy.

Although the case before this Court has developed largely on federalism grounds, Petitioner's *amici* insist that the appellate court failed to give sufficient weight to the privacy interests of drivers. A ruling by this Court recognizing a constitutional privacy interest in routine drivers' information would not only unduly expand the parameters of privacy law, but would threaten the press' and public's right of access to traditionally public information. Because Petitioner's *amici* argue against both the weight of this Court's precedent and common sense — and because a decision adopting their view could impede the flow of accurate, timely, and important public information — The Reporters Committee for Freedom of the Press, the American Society of Newspaper Editors and the Society of Professional Journalists submit this brief as *amici curiae*.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of working reporters and editors, dedicated to defending the First Amendment and freedom of information interests of the news media and the public. The Reporters Committee has provided representation, guidance, and research in virtually every major press freedom case that has been litigated in the United States since

1970. As a special project, the Reporters Committee sponsors the Freedom of Information Service Center, which daily advises reporters on issues of access to government records and proceedings.

The American Society of Newspaper Editors is a nationwide, professional organization of more than 850 members who hold positions as directing editors of daily newspapers throughout the United States and Canada. The purposes of the Society, which was founded more than 75 years ago, include the ongoing responsibility to improve the manner in which the journalism profession carries out its responsibilities in providing an unfettered and effective press in the service of the American people. ASNE is committed to the proposition that, pursuant to the First Amendment, the press has an obligation to provide the citizenry of the country with complete and accurate reports of the affairs of government — be they executive, legislative or judicial.

The Society of Professional Journalists is a voluntary, non-profit journalism organization representing every branch and rank of print and broadcast journalism. SPJ is the largest membership organization for journalists in the world, and for more than 90 years, SPJ has been dedicated to encouraging a climate in which journalism can be practiced freely, fully, and in the public interest.

STATEMENT OF THE CASE

Amici adopt the Respondent's Statement of the Case.

SUMMARY OF THE ARGUMENT

Although Congress has the authority to enact laws under § 5 of the Fourteenth Amendment, it may do so only to protect an individual's *rights*. Contrary to the contentions of

Petitioner's *amici,* the Electronic Privacy Information Center, the Screen Actors Guild, *et al.*, and the Feminist Majority Foundation, *et al.*, individuals do not have a constitutional right to privacy in the sort of routine information contained in state-maintained drivers' records. Neither the Supreme Court, nor the Fourth Circuit Court of Appeals, has ever recognized a constitutional right of privacy in the information contained in drivers' records or in any similar records. The Fourth Circuit Court of Appeals properly recognized this fact and correctly held that Congress could not constitutionally enact the Driver's Privacy Protection Act of 1994, 18 U.S.C. §§ 2721-25 (1997)(the "DPPA"), under the Fourteenth Amendment. This Court should do the same.

Furthermore, even assuming *arguendo* that such a privacy interest exists, the public's interest in disclosure outweighs any purported need for privacy.

Not only does Congress lack the authority to enact the DPPA under the Fourteenth Amendment, but its attempt to protect a driver's privacy from intrusions *by other citizens* runs contrary to this Court's recognition in *Katz v. U.S.* that the protection of a general right to privacy is better left to the states. Privacy rights under the federal constitution protect individuals from government intrusion. The right to be protected from intrusion by other private individuals traditionally has been regulated by the states. Every state in the Union has its own open records laws, many of which were subverted by passage of the DPPA. Efforts by the federal government to protect privacy against invasion by other citizens impermissibly trample on an area of traditional state regulation.

This Court should uphold the Fourth Circuit's ruling. Doing so will reinforce the appellate court's correct interpretation of constitutional privacy rights and promote this nation's long tradition of access to public records and information.

ARGUMENT

I. NO CONSTITUTIONAL RIGHT TO PRIVACY IN DRIVERS' INFORMATION EXISTS AND CONGRESS CANNOT THEREFORE ENACT THE DRIVERS' PRIVACY PROTECTION ACT UNDER § 5 OF THE FOURTEENTH AMENDMENT.

A. This Court has never recognized a constitutional right to privacy in drivers' information.

Several *amici* filing briefs on behalf of the United States contend that drivers' information[2] is private information, the disclosure of which may be prohibited under § 5 of the

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[2] The DPPA prohibits the disclosure of personal information contained in drivers' records and defines such information as:

> [I]nformation that identifies an individual, including an individual's photograph, social security number, driver identification number, name, address (but not 5-digit zip code), telephone number, and medical and disability information, but does not include information on vehicular accidents, driving violations and driver's status.

18 U.S.C. § 2725 (3) (1997).

Fourteenth Amendment.[3] Such a claim is specious.

Although many state regulatory schemes for drivers' information involve some subsequent disclosure of the information, not every government disclosure of personal information implicates constitutional protections. *See People of State of California v. FCC*, 75 F.3d 1350, 1361 (9th Cir. 1996), *cert. denied*, 517 U.S. 1216 (1996)(disclosure of telephone number is not protected by the federal constitution; it is "not among the select privacy interests protected by a federal constitutional right to privacy"), *citing Planned Parenthood v. Casey*, 505 U.S. 833, 849 (1992); *see also Katz v. U.S.*, 389 U.S. 347, 350, fn. 5 (1967) (virtually every governmental action interferes with personal privacy to some degree; the question is whether that interference violates a right guaranteed by the Constitution).

As this Court has noted, for Congress to invoke § 5 of the Fourteenth Amendment, "it must identify conduct transgressing the Fourteenth Amendment's substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct." *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, ___ U.S. ___, 67 U.S.L.W. 4580, 4583 (1999). Thus, in order to enact the DPPA, Congress must look for a right, the protection of

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[3] The Fourteenth Amendment provides in relevant part:

Section 1. . . . No State shall make or enforce any law which shall deprive any person of life, liberty, or property, without due process of law.

. . .

Section 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

which is grounded in the federal constitution.[4] However, neither this Court nor the Fourth Circuit Court of Appeals has ever recognized a constitutional right of privacy in drivers' information.

Although privacy rights arise from several constitutional provisions, the case before this Court questions whether a right to privacy in drivers' information exists. Such a right, if it were to exist, could only be grounded in the Fourth Amendment.[5] Other privacy rights, such as a right to privacy

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[4] In a recent decision, this Court explained:

Congress' power under § 5, however, extends only to "enforc[ing]" the provisions of the Fourteenth Amendment. The Court has described this power as "remedial." The design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States. Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. It has been given the power "to enforce," not the power to determine what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the "provisions of [the Fourteenth Amendment]."

City of Boerne v. Flores, 521 U.S. 507, 519 (1997)(*internal cites omitted*).

[5] The Fourth Amendment provides that:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the

(continued...)

in one's home or in one's associations,[6] simply are not implicated by the information at issue in this case.[7]

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[5](...continued)
place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV.

[6] The Fourteenth Amendment is not the only source of constitutional privacy rights. Several constitutional provisions protect an individual's privacy from government invasion. *Katz*, 389 U.S. at 350. As this Court explained:

> The First Amendment, for example, imposes limitations upon governmental abridgement of "freedom to associate and privacy in one's associations." The Third Amendment's prohibition against the unconsented peace-time quartering of soldiers protects another aspect of privacy from governmental intrusion. To some extent, the Fifth Amendment too "reflects the Constitution's concern for . . . '. . . the right of each individual "to a private enclave where he may lead a private life." '" Virtually every governmental action interferes with personal privacy to some degree. The question in each case is whether that interference violates a command of the United States Constitution.

Katz, 389 U.S. 347, 350, fn. 5 (internal citation omitted).

[7] The Court has recognized a finite number of constitutional privacy interests. Among them is a right to political privacy. *See DeGregory v. Attorney General of State of New Hampshire*, 383 U.S. 825 (1966). This Court and others have also recognized a limited right to privacy in communications, personal financial matters, and the contents of first-class mail. *See also Gelbard v. U.S.*, 408 U.S. 41 (1972)(privacy right in communications); *Hahnemann University v. Edgar*, 74 F.3d 456 (3rd Cir. 1996)(patient's right to confidentiality of psychiatric records constitutionally protected), *but see F.E.R. v. Valdez*, 58 F.3d 1530 (10th
(continued...)

As this Court has noted, "the Fourth Amendment cannot be translated into a general constitutional 'right to privacy.' " *Katz*, 389 U.S. at 350, *see also Whalen v. Roe*, 429 U.S. 589, 608 (1977)(Stewart, J. concurring). Rather, this Court has recognized that "zones of privacy" may be created by more specific constitutional guarantees. *Paul v. Davis*, 424 U.S. 693, 712-13 (1976).[8]

Twenty-three years ago, this Court noted that its privacy cases, "while defying categorical description, deal generally with the substantive provisions of the Fourteenth Amendment." *Paul*, 424 U.S. at 714.[9] One year later, the Court characterized its privacy cases as "hav[ing] . . . involved at least two different interests." *Whalen*, 429 U.S. at 598-600. "One," it noted, "is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of personal decisions." *Id.*

Of the two interests set forth by the Court, the first con-

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[7](...continued)
Cir. 1995) and *In Interest of M.B.*, 686 A.2d 877 (Pa. Commw. Ct. 1996); *Taylor v. I.R.S.*, 915 F.Supp. 1015 (N.D. Iowa 1996)(laws infringing on financial privacy rights are subject to intermediate scrutiny), *judgment aff'd*, 106 F.3d 833 (8th.Cir. 1997); and *U.S. v. Van Leeuwen*, 397 U.S. 249 (1970)(first-class mail free from inspection except as provided by the Fourth Amendment).

[8] Among these are the cases dealing with unreasonable searches and seizures by the government. *See Katz*, 389 U.S. at 351 and *Terry v. Ohio*, 392 U.S. 1, 8-9 (1968).

[9] Rights guaranteed by the Fourteenth Amendment are those that are "fundamental" or "implicit in the concept of ordered liberty." *Palko v. State of Connecticut*, 302 U.S. 319, 325 (1937).

cerns the right of the individual to maintain a degree of autonomy regarding intimate personal decisions about family and parenthood. It has long been settled law that the Constitution places limits on government's ability to interfere with a person's most basic decisions about marriage, procreation, contraception, family relationships, child rearing, education and bodily integrity. *Paul*, 424 U.S. at 713. *See also Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 849-51 (1992), *citing Carey v. Population Services International*, 421 U.S. 678, 684-86 (1977), *Loving v. Virginia*, 388 U.S. 1, 12 (1967), *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), *Washington v. Harper*, 494 U.S. 210, 221-22 (1990), *Winston v. Lee*, 470 U.S. 753 (1985) and *Rochin v. California*, 324 U.S. 165 (1952).

The second interest concerns the right to prevent the government from disseminating personal information. This is an interest, however, that this Court has refused to define. *See American Federation of Gov't Employees v. Dept. of Housing*, 118 F.3d 786, 791 (D.C. Cir. 1997).

The Court has examined this interest in at least two cases. In *Whalen*, this Court considered the constitutionality of a New York statute requiring the state to maintain a centralized computer file containing the names of individuals who had received certain dangerous prescription drugs. It concluded that "the New York program does not, on its face, pose a sufficiently grievous threat to either [privacy] interest to establish a constitutional violation." *Whalen*, 429 U.S. at 600. Tellingly, the Court went on to state that the government duty to avoid disclosure only "*arguably* has its roots in the Constitution." It then held that the record before the Court did not establish an invasion of any right or liberty protected

by the Fourteenth Amendment. *Id.* (emphasis added).[10]

This Court was equally reluctant to find a constitutional right to privacy in the disclosure of information in *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977). In that case, former President Nixon challenged the Presidential Recordings and Materials Preservation Act which required the disclosure of public and private documents and tape recordings kept during his presidency. Under the statute, an archivist would redact any "personal" materials. This Court stated, "We *may* agree with appellant that, at least when Government intervention is at stake, public officials, including the President, are not wholly without constitutionally protected privacy rights in matters of personal life unrelated to any acts done by them in their public capacity." *Nixon*, 433 U.S. at 457 (emphasis added). In the next sentence, this Court again repeated the use of "may," writing that "We *may* assume with the District Court, for purposes of this case, that the pattern of de facto Presidential control and congressional acquiescence gives rise to appellant's legitimate expectation of privacy in such materials." *Id.* at 457-58 (emphasis added). "But the merit of appellant's claim of his invasion of privacy cannot be considered in the abstract; rather, the claim must be

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[10] Additionally, in two cases cited in *Whalen*, the Court cites two dissents, neither of which argue for a *general* constitutional right to privacy. *See Olmstead v. United States*, 277 U.S. 438 (1928)(Brandeis, J., dissenting) and *California Bankers Assn. v. Shultz*, 416 U.S. 21, 85-86 (1974)(Douglas, J., dissenting). As the D.C. Circuit noted, "One reading of these citations, perhaps the one intended by *Whalen*, is that the Constitution protects against mandatory disclosure only where it threatens at particularized right such as the associational rights protected by the First Amendment." *American Federation of Gov't Employees v. Dept. of Housing*, 118 F.3d 786, 792 (D.C. Cir. 1997).

considered in light of the specific provisions of the Act, and any intrusion must be weighed against the public interest in [disclosure]," it added. *Id.*

This Court then held that even if the former president had a legitimate expectation of privacy in "personal" materials contained in the requested documents, the public interest in preserving the materials was sufficiently important to uphold the statute.

Perhaps as a result of its unwillingness to create new fundamental rights where none had previously existed, this Court has never recognized a general right of privacy in information disclosure. See *Bowers v. Hardwick*, 478 U.S. 186, 195 (1986)(advising against expanding list of fundamental rights) and *Reno v. Flores*, 507 U.S. 292 (1993). This Court has been more willing to discuss specific privacy interests arising within the context of the disclosure of certain uniquely personal information, such as that involved in *Nixon* (personal papers and files) and *Whalen* (information regarding the prescription of dangerous pharmaceuticals such as cocaine, methadone, and opium). However, it has stopped short of expressly recognizing a constitutional right of privacy in even this more intimate information.

Given this Court's refusal to find constitutional privacy rights arising from the disclosure of specific, *highly personal* information, it is hard to see how Petitioner's *amici* could suggest that a constitutional privacy right exists in information which is not of an intimate nature and is routinely distributed to other members of the public, businesses, and

government.[11] As a conceptual matter, routine identification information such as name, telephone number, and address information stands much farther from core privacy interests protected by the Fourth Amendment. Further, as the appellate panel recognized, it is a legal impossibility to claim a privacy interest in information one routinely provides to others.[12] In short, there simply is no constitutionally protectable privacy interest in drivers' information as defined under the DPPA. Without a constitutional right to privacy in drivers' information, Congress cannot utilize § 5 of the Fourteenth Amendment to enact the legislation in question.

B. A decision by this Court upholding the DPPA may constitutionalize a previously unrecognized privacy interest in the disclosure of routine public information, ultimately hindering newsgathering.

The information that the DPPA bars from disclosure is

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[11] Claims that a right to privacy in drivers' information are even more tenuous in situations where the driver has shared the information with other persons. This Court has stated that a privacy claim cannot succeed where the materials requested to be disclosed have already been made available to the public. *See Nixon*, at 459, *citing United States v. Dionisio*, 410 U.S. 1, 14 (1973).

[12] Not only does the holder of a driver's license routinely share that information with the public when providing identification for such tasks as writing checks or purchasing alcohol, but the exceptions contained in the Act itself undermine any expectation of privacy a driver may have. The Act is riddled with exceptions allowing access for such intrusive purposes as mass marketing, legal proceedings, insurance investigations, and motor vehicle market research surveys. *See* 18 U.S.C. § 2721(2)-(12). The exceptions allow access to drivers' information by a diverse range of parties and, ultimately, undermine the arguments of Petitioner's *amici* that Congress enacted the DPPA to protect the privacy of drivers.

not the sort of information in which a privacy right has been recognized. Nor should it be. This Court has not recognized a right to privacy from disclosure of routine information about individuals. Its refusal to do so would be undermined by any recognition of the validity of the DPPA. A decision by this Court declaring the DPPA to be validly enacted legislation could have the *de facto* effect of creating a drastically lower threshold for the sort of information to which one has a constitutional privacy interest. As a result, virtually any transfer of information regarding a citizen would be subject to scrutiny as an unconstitutional invasion of privacy.

Limiting disclosure about individuals who have transactions with government will severely impede newsgathering. Journalists routinely rely on information in government databases as an indispensable resource for investigative reporting. Drivers' records were among the investigative reporter's most valuable tools. By barring access to these records, the DPPA has the undeniable effect of silencing potential speech.

Prior to the enactment of the DPPA, the press and public used drivers' information for many purposes. For example, they could link cars that frequent open-air drug markets and other high-crime areas to certain addresses, thus establishing whether these crime-ridden areas attract a clientele from other neighborhoods. They also could investigate whether automobiles seen at those locations are owned by prominent individuals, civic leaders or public servants.

A major use of the records was for verification of identities. Journalists could exonerate innocent people, allowing specification of which "Smith," "Jones," or "Davis" was accused of a crime. Both neighborhood watch groups and reporters could use the information to identify reckless drivers, as well as those involved in hit-and-run accidents.

Thus, as the basic tool for reporting, drivers' information formed the foundation upon which much speech was later built. However, if journalists were to obtain this same information today, they would be subject to the DPPA's criminal and civil penalties. *See* 18 U.S.C. § 2722.[13]

Routine information identifying individuals appears in a wide range of government records — in property ownership records, in voter registration records, and in all manner of lists pertaining to governmental licenses, permits, grants, awards, and contracts. By recognizing, tacitly or otherwise, a privacy right in the disclosure of such routine information by the government, this Court could extend the chilling effect of the DPPA to a wide range of government records, thus threatening these traditional sources of information. The chilling effect of any expansion of the constitutional right to privacy will be substantial and, ultimately, the press and public will be deprived of much valuable information.

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[13] Section 2722 (a) provides that "It shall be unlawful for any person knowingly to obtain or disclose personal information, from a motor vehicle record, for any use not permitted under [the exceptions contained in the act]." Violations of the Act are punishable by criminal fines under Title 18 of the U.S. Code and individuals about whom information has been disclosed in violation of the DPPA's provisions may bring a civil suit under the Act against "a person who knowingly obtains, discloses or uses personal information, from a motor vehicle record, for a purpose not permitted [by the DPPA]." 18 U.S.C. § 2724.

II. EVEN ASSUMING *ARGUENDO* THAT A PRIVACY INTEREST IN THE DISCLOSURE OF DRIVERS' INFORMATION EXISTS, IT IS OUTWEIGHED BY THE PUBLIC'S INTEREST IN DISCLOSURE.

Even if one were to assume for the sake of argument that a constitutional privacy interest in the disclosure of drivers' information exists, that assumption does not end the relevant analysis. As this Court suggested in *Nixon*, analyzing whether government actions violate an individual's privacy interests is a two-step process. A court first must look for the existence of a constitutionally protected privacy right. Upon finding such an abstract interest, the court must then weigh the intrusion against the practical merits of both the privacy safeguards in the legislation and public's interest in disclosure. *Nixon*, 433 U.S. at 458,[14] *see also Whalen*, 429 U.S. at 605-06.[15]

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[14] Drawing on the two Fourth Amendment search and seizure cases, this Court in *Nixon* wrote that "the merit of appellant's claim of invasion of his privacy cannot be considered in the abstract; rather, the claim must be considered in light of the specific provisions of the Act, and any intrusion must be weighed against the public interest in subjecting the Presidential materials of [Nixon's] administration to archival screening." *Nixon*, 433 U.S. at 458, *citing Camara v. Municipal Court*, 387 U.S. 523, 534-539 (1967) and *Terry v. Ohio*, 392 U.S. 1, 21 (1968).

[15] Although this Court in *Whalen* addressed only the existence of a privacy right and ended its analysis by holding that the record did not establish an invasion of a right protected by the Fourteenth Amendment, its dicta suggests that a two-part test may be appropriate. This Court wrote that:

> The collection of taxes, the distribution of welfare and social
>
> (continued...)

In the case at hand, the public interest in the broad disclosure of drivers' information is substantial. Access to DMV records enables the press and public to scrutinize the government's handling of the licensing of drivers and the registration of vehicles. In the past, journalists have used DMV records to document how the state of Florida failed to keep drunk drivers off its highways. In 1991, *The Miami Herald* uncovered more than 70,000 persons in Dade and Broward counties who had been caught driving with suspended licenses.[16] DMV records also have great utility outside of the context of driving offenses. As a means of locating and

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[15](...continued)

> security benefits, the supervision of public health, the direction of our Armed Forces, and the enforcement of the criminal laws all require the orderly preservation of great quantities of information, much of which is personal in character and potentially embarrassing or harmful if disclosed. The right to collect and use such data for public purposes is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures. Recognizing that in some circumstances that duty arguably has its roots in the Constitution, nevertheless New York's statutory scheme, and its implementing administrative procedures, evidence a proper concern with, and protection of, the individual's interest in privacy. We therefore need not, and do not, decide any question which might be presented by the unwarranted disclosure of accumulated private data — whether intentional or unintentional — or by a system that did not contain comparable security provisions.

Whalen, 429 U.S. at 605-606.

[16] Driver's Privacy Protection Act of1994: Hearings on H.R. 3365 Before the Subcomm. On Civil and Constitutional Rights, 103rd Cong. 2nd Sess. (1994) (Statement of Richard Oppel, Washington Bureau Chief, Knight Ridder Newspapers).

identifying individuals, DMV records offer journalists an unparalleled resource. By using such records, journalists have been able to identify hooded Ku Klux Klan members and deadbeat dads.[17] A television news reporter used DMV records to discover that the drivers of Minnesota school buses included men convicted of murder, felony drug possession and armed robbery. One driver had even had his license revoked a year earlier. Although a criminal records check would have ordinarily uncovered the information, the state had a backlog of more than 100,000 criminal records that were not entered into its computer system.[18] A Minneapolis newspaper was able to uncover 41 passenger airline pilots who lost their Minnesota driver's licenses because of alcohol-related incidents. Such incidents had not been reported to the Federal Aviation Administration as required.[19] Without access to drivers' records, it is likely these stories would never have unfolded.

Stories such as these have produced tangible benefits for

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[17] *Id., see also* Driver's Privacy Protection Act of 1994: Hearings on H.R. 3365 Before the Subcomm. On Civil and Constitutional Rights, 103rd Cong. 2nd Sess. (1994)(Statement of Lucy Dalglish, National Chairwoman, Freedom of Information Committee, Society of Professional Journalists).

[18] Robert Franklin, *Keeping Open Records Open*, MINNEAPOLIS STAR-TRIBUNE, Feb. 2, 1994, at A12.

[19] *Id.* Other uses cited by Franklin have included investigating a man who claimed to have foreign banking connections that would finance a $35 million riverfront entertainment center in St. Paul and discovering that a charity which had been pleading for donations to buy a refrigerated truck had recently purchased a Mercedes-Benz for its president. *Id.*

the public. An award-winning, five-month undercover investigation into automobile title laundering by a Minneapolis television station documented how automobiles wrecked in other states were issued "clean titles" in that state and sold to unsuspecting customers. The station's reporters relied on DMV records to locate and contact the owners of rebuilt vehicles and to determine which dealerships sold those vehicles without informing consumers. This information, along with other reportage, was broadcast in a 30-minute documentary titled "Licensed to Steal." Following its airing, one of the dealers pleaded guilty to criminal charges and federal legislation aiming to combat salvage fraud was proposed.[20]

The evidence is clear — the public interest in the broad disclosure of DMV records is substantial. Whether to used ensure government accountability or prevent consumer fraud, DMV records served as an crucial source of information, access to which must be weighed against the value of any constitutional right to privacy in the information.

III. BY ENACTING THE DPPA, CONGRESS HAS INTRUDED UPON AN AREA TRADITIONALLY CONTROLLED BY THE STATES.

In the case before the Court, the United States claims that the DPPA is not a regulatory scheme. However, it clearly is. Every state has its own open records law dictating what information may be withheld from the public. In this way, the states are able to regulate what information about individuals is made available to other parties, thus controlling the degree to which information about a driver is disseminated to third-party requesters.

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[20] *Id.*

Historically speaking, it has been the states — and not the federal government — that have licensed drivers and registered motor vehicles.[21] In doing so, the states collected drivers' information and disclosed it according to their individual open records laws.[22] Thus, each individual state could tailor its disclosure scheme to meet the openness requirements of its citizens. Prior to the implementation of the DPPA, thirty-four of the states deemed access to this infor-

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[21] State regulation in this area dates to the turn of the century. Brief for *Amici Curiae*, States of Alabama and Oklahoma, *et al.*, *Condon v. Reno*, (4th Cir. 1998) at 5, *citing* Xenophon P. Huddy, *The Law of Automobiles*, 9 Law Notes 147, 148 nn. 9 & 10 (1905)(discussing State of New York's motor vehicle registration requirements and State of Missouri's driver's license requirements); Xenophon P. Huddy, *The Motor Car's Status*, 15 Yale L.J. 83, 85 & n.16 (1905)(noting "statutory enactments concerning the registration and licensing of automobiles" and citing Rhode Island's 1904 registration statute); H.B. Brown, *The Status of the Automobile*, 17 Yale L.J. 223, 225 (1908)(explaining that it had already been deemed necessary to require automobiles "to be registered or licensed"); *Kane v. State of New Jersey*, 242 U.S. 160 (1916) and *Hendrick v. State of Maryland*, 235 U.S. 610 (1915).

[22] In 1941, this Court acknowledged that registration and licensing of drivers by the states was "universal."

> The use of the public highways by motor vehicles, with its consequent dangers, renders the reasonableness and necessity of the regulation apparent. The universal practice is to register ownership of automobiles and to license their drivers. Any appropriate means adopted *by the states* to insure competence and care on the part of the licensees and to protect others using the highway is consonant with due process.

Reitz v. Mealey, 314 U.S. 33, 36 (1941)(emphasis added).

mation to be of such importance that their open records laws required it to be available to the public. They were: Arizona, Colorado, Connecticut, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New York, North Carolina, North Dakota, Ohio, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Vermont, Washington, West Virginia, Wisconsin, and Wyoming.[23] On the other end of the spectrum, eight states' laws were already more restrictive than the federal law.[24]

However, by forcing the states to comply with a federal regulatory scheme, Congress has undercut the states' traditional authority in this area. In so doing, Congress runs afoul of this Court's proclamation in *Katz* that the protection of a general right to privacy is left to the states, and not the federal government.[25] Enacted primarily as an anti-stalking

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[23] *See e.g.* 139 Cong. Rec. S15, 762 (Nov. 16, 1993)(statement of Sen. Boxer); Hearings on H.R. 3365 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 1994 WL 14167988 (Feb. 4, 1994)(statement of Rep. Moran).

[24] According to the Society of Professional Journalists, these states are: Alaska, Arkansas, California, Georgia, Hawaii, Pennsylvania, Utah and Virginia. *See* http://spj.org/foia/drivers/drivside1.htm (updated Jan. 13, 1999).

[25] This Court wrote that:

> [The Fourth] Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go no further, and often have nothing to do with privacy at all. Other provisions of

(continued...)

measure, the DPPA aims to prevent members of the public from uncovering address and other information about an individual, thereby encroaching on a state's traditional role in protecting its citizens' privacy from intrusions by other individuals. However, states had already acted to meet the needs of potential stalking victims directly. In response to growing fears sparked by the 1989 stalking and murder of actress Rebecca Schaeffer — the same murder that gave rise to the DPPA — California enacted an anti-stalking law, criminalizing the act of stalking itself. *See* Cal. Penal Code § 646.9 *et. seq.* By the close of 1993, all fifty states and the District of Columbia had enacted anti-stalking statutes. *See* James L. Hankins, *Criminal Law: Criminal "Anti-Stalking" Laws: Oklahoma Hops on the Legislative Bandwagon*, 46 OKLA. L. REV. 109, 114 (1993)(collecting citations). Thus, every state had addressed concerns about stalking through anti-stalking legislation. Concerns about the dissemination of information were adequately considered in state open records laws, as well. The DPPA's passage and enactment therefore impermissibly intruded on an area of traditional state regulation.

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[25](...continued)
the Constitution protect personal privacy from other forms of government invasion. But the protection of a person's general right to privacy — his right to be left alone by other people — is, like the protection of his property and his very life, left largely to the law of the individual states.

Katz, 389 U.S. 347, 351.

CONCLUSION

If the DPPA is allowed to stand, this Court will effectively signal to Congress that restrictions on the disclosure of previously public information are perfectly acceptable if executed to protect a heretofore unrecognized privacy interest. The consequences of this Court's decision will have far-reaching effects, restricting newsgathering and expanding the parameters of privacy. As a clear breach of the principles of federalism, the DPPA should be struck down because it violates the states' sovereignty. As a matter of Fourteenth Amendment jurisprudence, the law should be struck down because Congress lacked the authority to enact it. As legislation enacted contrary to this nation's tradition of broad public access to government records, the law should be struck because it threatens the public's right to access. Therefore, the Reporters Committee for Freedom of the Press, the American Society of Newspaper Editors and the Society of Professional Journalists urge this Court to uphold the decision of the Fourth Circuit Court of Appeals.

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In the

Supreme Court of the United States

JANET RENO, Attorney General of the United States, *et al.*,

Petitioners,

v.

CHARLIE CONDON, Attorney General for the State of South Carolina, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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QUESTION PRESENTED

Whether the Driver's Privacy Protection Act of 1994 contravenes constitutional principles of federalism.

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INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of the Respondents.[1] Written consent for amicus participation in this case was granted by counsel for all parties and lodged with the Clerk of this Court.

Pacific Legal Foundation is the largest and most experienced nonprofit public interest law foundation of its kind in America. Founded in 1973, PLF provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, individual freedom, and free enterprise. PLF litigates nationwide in state and federal courts with the support of thousands of citizens from coast to coast. PLF is headquartered in Sacramento, California, and has offices in Miami, Florida; Honolulu, Hawaii; Bellevue, Washington; and a liaison office in Anchorage, Alaska.

PLF has participated in numerous cases concerning the scope of the Commerce Clause and federalism. For example, PLF participated as amicus curiae before this Court in *Alden v. Maine*, 119 S. Ct. 2240 (1999); *Printz v. United States*, 521 U.S. 898 (1997); *United States v. Lopez*, 514 U.S. 549 (1995); and *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*, 452 U.S. 264 (1981).

PLF believes that the significance of this case reaches beyond its facts because it addresses a fundamental question of law that goes to the heart of how the Constitution allocates power between the federal government and the states. Amicus seeks to augment the arguments in the Respondents' brief regarding the proper understanding of the federalist system

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[1] Pursuant to Supreme Court Rule 37.6, Amicus Curiae Pacific Legal Foundation affirms that no counsel for any party in this case authored this brief in whole or in part; and, furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

established by the Constitution. PLF believes its public policy perspective and litigation experience dealing with federalism and the Constitution's enumeration of powers will provide this Court with a broader policy viewpoint than that presented by the parties and believes its broader viewpoint will aid this Court in the resolution of this case.

STATEMENT OF THE CASE

The State of South Carolina is challenging the constitutional validity of the Driver's Privacy Protection Act (DPPA). 18 U.S.C. § 2721, *et seq*. The DPPA, a federal law, prohibits South Carolina's Department of Motor Vehicles (DMV) employees, under threat of criminal and civil liability, from disclosing driver record information to members of the public.[2] *Id*. Conversely, South Carolina requires that these records be available to the public under state open records laws. *Condon v. Reno*, 155 F.3d 453, 457 (4th Cir. 1998).

South Carolina challenged the DPPA, alleging that the Act violated the Tenth Amendment. *Id*. at 456. The district court agreed with South Carolina and enjoined the Act's enforcement. *Condon v. Reno*, 972 F. Supp. 977, 979 (D.S.C. 1997). On appeal, the Fourth Circuit affirmed. *Condon v. Reno*, 155 F.3d at 465. The Petitioners, United States Attorney General Janet Reno and the United States, petitioned this Court for a writ of certiorari which this Court granted. *Reno v. Condon*, 119 S. Ct. 1753 (1999).

SUMMARY OF ARGUMENT

There are at least two ways a federal law can be held constitutionally invalid. One is where Congress enacts a law for which the Constitution has not granted it authority. *See, e.g., United States v. Lopez*, 514 U.S. 549; *City of Boerne v. Flores*,

[2] South Carolina's motor vehicle agency is called the Department of Public Safety. For uniformity among the briefs, amicus adopts the generic designation "DMV."

507 U.S. 507 (1997); *Alden v. Maine*, 119 S. Ct. 2240. Another is where an affirmative provision of the Constitution, for example the First Amendment, specifically protects certain spheres of individual or state activity from federal encroachment. *See, e.g., Buckley v. Valeo*, 424 U.S. 1 (1976); *Printz v. United States*, 521 U.S. 898. This brief will explain that the DPPA is invalid under either standard.

Congress lacks authority under the Commerce Clause to enact the DPPA because the DPPA does not regulate interstate commerce or an activity that substantially affects interstate commerce. Petitioners' arguments that the DPPA is valid commerce legislation because: (1) states "sell" DMV records and (2) purchasers of DMV records use such records for commercial purposes, are unavailing. First, a state's ability to collect administrative fees does not automatically render a state agency's action subject to federal commerce legislation; rather, the ability to engage in such functions is an attribute of a sovereign government. Further, the DPPA operates without regard to such fees. Second, the potential for commercial use of DMV information *by private parties* does not authorize Congress to regulate *the state's* dissemination of DMV records *for all purposes*. An incidental connection to interstate commerce is not sufficient to enable Congress to intrude wholesale into the internal operation of state agencies.

Further, even if Congress could regulate state driver records under its commerce powers, the constitutional principle of federalism, as exemplified by the Tenth Amendment and Guarantee Clause, prohibits Congress from dictating the policies of South Carolina's Department of Motor Vehicles. This Court's decisions in *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 521 U.S. 898, established that Congress could not coerce the states into implementing federal policy. Further, the Guarantee Clause demonstrates that the Constitution intended state citizens to be able to govern themselves through state government. The DPPA upsets this

structure by depriving state citizens of the ability to choose the policies by which their own state agencies should be operated. For these reasons, the DPPA is unconstitutional.

I

THE DPPA IS NOT A VALID EXERCISE OF CONGRESS' COMMERCE POWERS BECAUSE THE DISSEMINATION OF DRIVER RECORDS BY A STATE AGENCY DOES NOT CONSTITUTE INTERSTATE COMMERCE

Article I, Section 8, Clause 3, of the Constitution states:

> The Congress shall have the power . . . [t]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes.

The Petitioners assert there is "no doubt" that the DPPA was validly enacted as commerce legislation. Brief for the Petitioners at 21. However, despite the certainty with which they issue this statement, and their suggestion that the issue is not properly before this Court, *id.* at 22 n.9, the Petitioners nevertheless expend several pages of the brief arguing the point. *Id.* at 12, 20-24. As the Question Presented asks simply whether the DPPA violates the constitutional principle of federalism, and because the principle of federalism involves the issue of whether Congress is properly acting within the confines of the Constitution's grant of power, whether the DPPA is valid commerce legislation is properly before this Court.[3]

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[3] Furthermore, Commerce Clause challenges were raised in other cases challenging the validity of the DPPA. *See Pryor v. Reno*, 171 F.3d 1281 (11th Cir. 1999); *Travis v. Reno*, 163 F.3d 1000 (7th Cir. 1998); *State of Oklahoma ex rel. Oklahoma Department of Public Safety v. United States*, 161 F.3d 1266 (10th Cir. 1998). Petitions on these cases are currently pending before this Court. *Oklahoma Department of Public Safety v. United States*, 68 U.S.L.W. 3055 (July 20, 1999) (No. 98-1760); *Wisconsin Department of Transportation*,

(continued...)

The Petitioners' argument is twofold. First, it asserts that the State of South Carolina's "sale" of driver information is itself "interstate commerce." Brief for the Petitioners at 22. Second, it alleges that the information, once sold, is used in interstate commerce, and is therefore subject to regulation. *Id.* at 22-23. But, as explained below, upon examination, the evidence garnered in support of these arguments is both scant and inadequate. Moreover, even if the government could establish a sufficient interstate commerce connection through these means, Congress' complete usurpation of state policy choices regarding the treatment of state-maintained driver records through the DPPA reaches so far beyond any arguable connections to interstate commerce that it cannot be justified as a regulation of activities that substantially affect interstate commerce.

A. South Carolina's Operation of Its DMV Is Not "Commerce" Simply by Virtue of Its Levy of an Administrative Fee, Let Alone "Commerce . . . Among the States"

The Petitioners attempt to make much of the fact that state departments of motor vehicles, including that of South Carolina, collect a fee for the "sale" of state motor vehicle record information. They aver that

> state DMVs frequently sell the personal information held in their records, and that States collect substantial sums from such sales.

Id. at 22. Remarkably, the Petitioners' argument appears to be based upon the bare assertion that, because a state agency operates like a business enterprise whenever it charges an administrative fee (that is, it exchanges a fee for services), this

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[3](...continued)
Division of Motor Vehicles v. Reno, 68 U.S.L.W. 3055 (July 20, 1999) (No. 98-1818); *Reno v. Pryor*, 68 U.S.L.W. 3096 (Aug. 3, 1999) (No. 99-61).

creates a general license for Congress to intrude wholesale into state regulatory programs under its commerce powers. That is, the Commerce Clause would authorize Congress to dictate the policies of any state agency on matters ranging from building permitting to the regulation of attorneys, doctors, and cosmeticians.[4]

The fact that the State of South Carolina or any other state may charge an administrative fee to cover the cost of reproducing state records is insufficient to create a jurisdictional "hook" by which Congress can intrude into the inner workings of *any* state's DMV. Nothing in the DPPA limits its application to those states which charge administrative fees, and if states like South Carolina repealed their fee statutes, the DPPA would still require these states to comply with its mandates. For example, the State of California does not charge a fee at all--because it does not release driver records at all. But this does not exempt California and the 15 other states with confidential records policies from complying with the DPPA's provisions. Thus, the fee charged by *some* states is completely irrelevant for purposes of Commerce Clause jurisdiction.

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[4] Like these permitting programs, a state DMV's primary function is as a regulatory agency, and the dissemination of driver records is incidental to this function. Though this Court in *Garcia v. San Antonio Metropolitan Transportation Authority*, 469 U.S. 528 (1985), eschewed the notion that courts could distinguish between state activities on the basis of what did or did not constitute "traditional government functions," *id.* at 534 (citation omitted), regulatory functions like the licensing and registration of drivers and vehicles, with their attendant legal ramifications, are quintissentially governmental, as contrasted with the operation of bus systems (*Garcia*) and schools and hospitals (*Maryland v. Wirtz*, 392 U.S. 183 (1968)). Thus, even though the Petitioners presume that such state functions always fall within Congress' commerce authority, this Court has not always so held, and the presumption is open to question.

B. The Commercial Use of DMV Information by Private Parties Cannot Justify Regulation of the State, Particularly Where the DPPA Does Virtually Nothing to Curb the Private Commercial Uses Purportedly Targeted by Congress

The Petitioners' alternative argument is that Congress has authority under the commerce power to regulate DMV records because businesses may utilize the information gleaned from South Carolina's DMV for the purpose of mass marketing.

That individuals may utilize DMV information for commercial purposes is beyond debate. But it hardly explains why the uses to which private parties may put this information entitles Congress to regulate the *State of South Carolina*. South Carolina does not dictate the purposes for which others may use the DMV information they disseminate, and does not discriminate in the administration of its open-records policy between those who would seek to use DMV records for commercial purposes and those who would use them for noncommercial purposes.[5] Rather, it administers its policy in a perfectly neutral manner. South Carolina's administration of DMV records cannot become "commerce" simply because the recipient of such information, at his or her option, uses such information for commercial purposes. While those accessing driver records may use the information for commerce, they also may use the information for many other and varied noncommercial uses. *See* Thomas H. Odom and Gregory S. Feder, *Challenging the Federal Driver's Privacy Protection Act: The Next Step in Developing a Jurisprudence of Process-Oriented Federalism Under the Tenth Amendment* 53 U. Miami L. Rev. 71, 109-10 (1998). If the Petitioners' arguments justify congressional interference, Congress could regulate other state licensing schemes more directly related to commerce such as

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[5] South Carolina prohibits the use of DMV information for telephone solicitation. S.C. Code Ann. §§ 56-3-510 to 56-3-540 (West Supp. 1998).

licenses for building contractors, doctors, cosmeticians, and so forth. In contrast, the chasm between South Carolina's administration of its DMV records and interstate commerce carried out by private parties is extraordinarily wide: the regulation of the former can hardly be characterized as a necessary and proper means to reach the latter.

The legislative history cited in the Petitioners' brief demonstrates that, at best, Congress heard testimony asserting that mass marketers find the information contained in DMV records to be particularly useful for certain marketing efforts. Brief for the Petitioners at 4-6, 17, 22-23. But nothing in the legislative history recited by the Petitioners indicates that Congress ever attempted to justify the DPPA as regulating that commerce. Instead, the evidence that mass marketers utilize DMV information is little more than a gesture of *homage* to the notion of constitutionally enumerated powers than an explanation of how this commerce warranted federal regulation through the enactment of the DPPA. *See* Brief for the Petitioners at 4. In short, this is a situation in which Congress used "a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities." *Maryland v. Wirtz*, 392 U.S. at 197 n.27.

The fact is, the DPPA is not about commerce at all. Instead, it is a decision by Congress that its own policy choices on the administration of state driver records is wiser than that of the individual states. Indeed, the Petitioners concede as much:

> The overarching theory of the DPPA is that, except in certain circumstances *in which Congress has found an important public interest* warranting disclosure, the [DPPA restricts] dissemination of personal information in state DMV records.

Brief for the Petitioners at 6 (emphasis added). And:

> The Act permits DMVs to disclose personal information . . . in circumstances *in which Congress found* that the public interest in disclosure for a particular use outweighs concerns about invasion of privacy.

Id. at 8 (emphasis added). And:

> Congress has prohibited many kinds of disclosures but has permitted personal information to be released *in circumstances where it has found an important countervailing interest* warranting disclosure or access.

Id. at 16 (emphasis added). And:

> In these statutes, *Congress has balanced individuals' privacy interests with countervailing public interests* in disclosure.

Id. at 21 (emphasis added). Through this "weighing of balances," Congress has essentially acknowledged that, indeed, disclosure of such records can serve important public interests. The DPPA's sole purpose is to allow Congress, rather than the states, to decide which of those interests are worthy.

The DPPA prohibits all state DMVs from disclosing any driver records for any purpose outside of certain enumerated exceptions. 18 U.S.C. § 2721. And those exceptions are not based upon commerce, but, as the Petitioners explain, upon a weighing of privacy concerns with other competing interests. The sole aim of the DPPA is to prohibit state motor vehicle agency employees from releasing driver information where Congress has determined that such disclosures are bad public policy, not to regulate interstate commerce. It does not limit its proscriptions to disclosures related to commerce, nor does it seek to regulate individuals who use DMV records for commercial purposes.

Had Congress intended to regulate the commercial use of DMV records through the DPPA, it could have placed restrictions on commercial purchasers or users, rather than state DMVs. Regulating the dissemination of DMV records is not only unnecessary for Congress to regulate the interstate trade in personal information, it is a remarkably poor mechanism to accomplish that purpose. Significantly, Congress made almost no effort in the DPPA to regulate this trade. On its face, the DPPA's treatment of the use of DMV information for mass marketing is so offhand, and so marginal in relation to the Act as a whole, that it leaves state policies regarding the distribution of records for mass marketing virtually intact. The DPPA only addresses itself to mass-marketing as the *twelfth* item in a list of *fourteen specific exemptions* to the basic nondisclosure provisions of the Act. And there, the DPPA specifically allows disclosure of driver records to mass marketers, with the single requirement that individuals be given an opportunity to "opt out" of having their own records revealed. 18 U.S.C. § 2721(12).

The Commerce Clause simply does not grant Congress authority to regulate any activity under its commerce power just because it can identify some factual link, however irrelevant or trivial, between the activity being regulated and interstate commerce. Rather, when it comes to intrastate noncommercial activities, a regulation's validity turns upon whether it targets the identified commerce. As explained in *Wickard v. Filburn*, 317 U.S. 111 (1942), the commerce power must be directed at commerce--it

> extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them *appropriate means to the attainment of a legitimate end*, the effective execution of the granted power to regulate interstate commerce.

Id. at 124 (citation omitted; emphasis added) (cited in *Lopez*, 514 U.S. at 555). Thus, federal regulation of these activities is valid only where such regulation is designed and appropriate for regulating interstate commerce. The DPPA does not fit into this mold. The DPPA's prohibition on disclosure is universal, qualified only by Congress' privacy sensibilities, not by interstate commerce concerns. For these reasons, this Court should hold that Congress exceeded its authority under the Commerce Clause in enacting the DPPA.

II

THE DPPA VIOLATES CONSTITUTIONAL PRINCIPLES OF FEDERALISM EMBODIED IN THE TENTH AMENDMENT AND THE GUARANTEE CLAUSE OF ARTICLE IV

A. This Court's Decisions in *New York* and *Printz* Establish That Congress May Not Flatly Coerce States or State Agencies into Implementing Federal Policy

Even if this Court were to accept the premise that Congress could enact the DPPA under its commerce powers, this is not the end of the constitutional inquiry. The question remains whether the Constitution nonetheless establishes affirmative limitations on Congress' authority that would invalidate the DPPA. As the Fourth Circuit framed the issue, "the question before this Court is not whether the DPPA regulates commerce, but whether it is consistent with the system of dual sovereignty established by the Constitution." *Condon v. Reno*, 155 F.3d at 458. The State of South Carolina contends that the DPPA violates the Tenth Amendment. *Id.* at 455. The Tenth Amendment states:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

As this Court has explained at length, however, an assertion that Congress has violated the Tenth Amendment is more aptly characterized as an assertion that Congress has attempted to regulate the states in a way that is contrary to the federalism structure:

> The Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States.

New York v. United States, 505 U.S. at 157.

This Court's decisions in *New York* and *Printz* helped define the constitutional limitations the principle of federalism imposes on the ability of the federal government to encroach upon the internal operation of state government. Specifically, this Court held that, even where the federal government is operating within its enumerated powers, federalism nevertheless constrains the federal government from achieving legitimate ends by illegitimate means--that is, by coercion of the states. *New York*, 505 U.S. at 160; *Printz*, 521 U.S. at 2380-81.

In *New York*, the Supreme Court resolved the constitutionality of the "take title" provisions to the Low-Level Radioactive Waste Policy Act. The "take title" provision required that, if a state did not provide a means for the disposal of radioactive waste produced within the state, a generator or owner of the waste could, by request, force the state to take title to the waste. *New York v. United States*, 505 U.S. at 153-54. Alternatively, the statute compelled states to regulate waste according to Congress' instructions. *Id.* at 152-53. The sole challenge in *New York* was to the method by which Congress chose to regulate: through forcing states to take title to the waste, or, alternatively, requiring that they legislate in a certain manner. This Court held the "take title" provisions constitutionally infirm.

The Petitioners erroneously argue that *New York* stands only for the proposition that the federal government may not force the states to regulate private parties. Brief for the Petitioners at 28-30. While it is true this Court focused primarily upon that part of the statute which directed the states to legislate, the decision in *New York* was not so narrow. Indeed, the validity of the provision in question depended upon this Court's conclusion that both the "take title" mandate and the direction to legislate were unconstitutional:

> Because an instruction to state governments to take title to waste, *standing alone, would be beyond the authority of Congress*, and because a direct order to regulate, standing alone, would also be beyond the authority of Congress, it follows that Congress lacks the power to offer the States a choice between the two.

New York, 505 U.S. at 176 (emphasis added). Indeed, the constitutionality of the simple mandate to the states to "take title" was so little questioned that this Court spared minimal space explaining the point. Thus, contrary to the Petitioners' characterization, *New York* did not announce a narrow rule that Congress may not force the states to legislate. Rather, it stood for a broader proposition: Congress may not coerce the states, through a simple mandate, into advancing federal ends.

In explaining this distinction, the Court identified means by which Congress could validly direct states to regulate according to federal standards. First, Congress can make the grant of federal funds dependent upon state compliance with federal mandates. *Id.* at 167. Second, Congress can regulate by offering states the choice of regulating according to federal standards or having state law preempted by a federal regulatory program administered by the federal government. *Id.* at 167. In describing the permissible means by which Congress can direct the states, the Court noted:

By either of these methods, as by any other *permissible method* of encouraging a State to conform to federal policy choices, the residents of the States retain the ultimate decision as to whether or not the State will comply. If a State's citizens view federal policy as sufficiently contrary to local interests, they may elect to decline a federal grant. If state residents would prefer their government to devote its attention and resources to problems other than those deemed important by Congress, they may choose to have the Federal Government rather than the State bear the expense of a federally mandated regulatory program, and they may continue to supplement that program to the extent state law is not pre-empted. Where Congress encourages state regulation rather than compelling it, state governments remain responsive to the local electorate's preferences; state officials remain accountable to the people.

New York, 505 U.S. at 168 (emphasis added). But here, just as the "take title" provisions at issue in *New York* gave states a choice between two coerced alternatives, Congress has not employed any of the "permissible methods" described by the Court. The DPPA is not tied to any federal funding, and does not offer states a choice between state regulation according to federal dictates or direct regulation by the federal government. The DPPA is simply a mandate directing the states to administer their driver's records in the manner chosen by Congress.

To the extent the DPPA does not expressly direct state legislatures to legislate in a certain way, it is unlike *New York*.[6]

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[6] Of course, Congress anticipated that states would have to pass implementing legislation or regulations. *See, e.g.*, Odom and Feder, *Challenging the Federal Driver's Privacy Protection Act*, 53 U. (continued...)

Condon, 155 F.3d at 460. Instead, it goes directly to the conduct of state agency employees. However, this Court's decision in *Printz* has already flatly rejected the notion that Congress could bypass state legislatures and regulate state employees directly.

Printz was a Tenth Amendment challenge to the Brady Act, an amendment to the Handgun Control Act of 1968, regulating the sale of firearms. *Printz*, 521 U.S. at 903-04. Among its other provisions, the Brady Act required a firearms dealer to obtain information about prospective firearm purchasers on a federal form. *Id.* at 903. Once the dealer obtained this information, he or she was required to forward the form to the chief law enforcement officer of the county in which the prospective purchaser lived. *Id.* The officer was then required to undertake a "reasonable effort," including a background check, to insure that transfer of a firearm to the prospective purchaser would not violate state or federal law. *Id.* The officer was also required to undertake several other obligations with respect to handling the form and the information contained therein. *Id.* at 903-04.

Two county sheriffs challenged the background check provisions of the Brady Act on Tenth Amendment grounds. *Id.* at 904. The sheriffs contended that, as state employees, with their primary obligation and oath to fulfill their state law responsibilities, Congress could not force them to carry out these federal duties. *Id.* This Court agreed, and extended its holding in *New York*:

> We held in *New York* that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting

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[6](...continued)
Miami L. Rev. at 107 (State of Wisconsin legislature had to pass legislation to implement the DPPA).

> the State's officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.

Printz, 521 U.S. at 935. This Court was not persuaded by the government's arguments that directing the conduct of state officers was less offensive to federalism than directing the conduct of state legislatures, stating:

> To say that the Federal Government cannot control the State, but can control all of its officers, is to say nothing of significance.

Id. at 931. Now, Congress has made another creative attempt to circumvent constitutional limitations on its powers. In the DPPA, Congress did not expressly declare an intent to force the states to change their laws, an avenue clearly proscribed by *New York*. Neither has Congress sought to conscript state employees into carrying out a federal regulatory program, as in *Printz*. Instead, Congress is forcing the states to administer their own regulatory programs according to federal policy directives.

But this effort aimed at exploiting a perceived loophole left by *New York* and *Printz* is even more offensive to principles of federalism. Here, Congress eschews entirely any relationship between the DPPA and a federal regulatory program. Indeed, the federal government has no interest in preempting the field of regulating drivers and motor vehicle registration. Instead, it leaves this regulatory responsibility, and its attendant costs and liabilities, to the states. But because Congress believes that motor vehicle departments ought to be run in a particular way, it enacted the DPPA to force states to regulate according to federal policy choices.

B. Petitioners' Attempt to Construct a Methodology for Determining Whether a Statute Violates Federalism Is Based on an Erroneous Interpretation of This Court's Decisions in *Baker* and *Garcia*

New York and *Printz* control the outcome of this case. Nonetheless, the Petitioners attempt to shoehorn the DPPA into what they style as a separate category of federal enactments upheld by this Court in *South Carolina v. Baker*, 485 U.S. 505 (1988), and *Garcia*, 469 U.S. 528. Brief for the Petitioners at 35-38. However, this attempt to distinguish the DPPA is based upon several false premises. First, they assert that *New York* and *Printz* only proscribe federal enactments that force states to regulate third parties. *See* Brief for the Petitioners at 35. Second, they contend that *Baker* and *Garcia* establish that any federal legislation is valid so long as Congress may regulate private parties upon the same basis. Brief for the Petitioners at 36-37.

The Petitioners' first argument is easily disposed of. This Court has never stated that federalism is only implicated where Congress forces states to regulate private third parties. As stated above, this Court's decision in *New York* revolved around the idea that Congress may not commandeer the states, not around the Petitioners' newly minted interpretation that such commandeering is *only* unconstitutional where that commandeering relates to private third parties. Instead, the decision in *New York* depended, in part, on finding that a simple mandate to the states to "take title" to radioactive waste was by itself unconstitutional. *New York*, 505 U.S. at 176. Indeed, this Court's recent decision in *Alden v. Maine*, 119 S. Ct. 2240, affirmed the idea that simple mandates to the states are no more immune from federalism challenges than the statutes at issue in *New York* and *Printz*. *Id.* at 2247. In *Alden*, this Court held that Congress lacks the constitutional authority to require state courts to entertain suits against the states to enforce federal

legislation under Article I. *Id.* at 2266. And neither *Baker* nor *Garcia* prove otherwise.

To the extent that any language in *Baker* and *Garcia* aids the Petitioners, it is difficult to conceive of how those cases determine the result in this case given this Court's subsequent federalism jurisprudence. Indeed, they can only aid the Petitioners if one treats them, as Petitioners implicitly suggest, as though they represent a distinct line of federalism jurisprudence apart from *New York* and *Printz*. But it is more accurate to say that these cases present a distinguishable set of facts, rather than a distinct body of federalism law.

For example, *Baker* dealt with a Tenth Amendment challenge to a federal law making income from unregistered state bonds subject to federal income tax. *Baker*, 485 U.S. at 510. Though this Court framed the issue "as if [the statute] directly regulated States by prohibiting outright the issuance of bearer bonds," *id.* at 511, the fact of the matter is, the statute did nothing of the kind. What it did do was make state-issued unregistered bonds unmarketable: "competition from other nonexempt bonds would force States to increase the interest paid on state bonds by 28-35%." *Id.* Because states could not afford to pay the increased bond rates, they ceased issuing them. *Id.*

Despite the loose language of that decision, and the Petitioners' suggestion that *Baker* stands for the unyielding proposition that Congress always has the power to regulate the states directly, the DPPA is not comparable to the facts in *Baker*. In changing the federal tax code in *Baker*, Congress' object was not the regulation of the states, its object was to enforce federal tax law. The resultant effect on state activities was purely incidental. *Baker* thus held that federalism did not require Congress to provide a *special exemption* for state activities.

Garcia, of course, presented yet another situation. But again, the facts there are readily distinguishable from the present case. In *Garcia*, this Court held that Congress could constitutionally regulate the states as "employers" under the Fair Labor Standards Act. *Garcia*, 469 U.S. at 554. In *New York* and *Printz*, this Court explained that *Garcia* did not control because these cases were not ones "in which Congress has subjected a State to the same legislation applicable to private parties." *New York*, 505 U.S. at 160. *See also Printz*, 521 U.S. at 932. However, by that statement, this Court did not indicate that, if a law may generally be applied to states and private parties, such laws are *per se* constitutional. Instead, this Court acknowledged that federalism decisions arising in that context have "traveled an unsteady path" and that they presented a different question. *New York*, 505 U.S. at 160. Here, because the DPPA applies only to the states, it is not clear that *Garcia*, and what it may or may not stand for, is even relevant. *See Printz*, 521 U.S. at 932. But Petitioners nevertheless argue that, because Congress *could* subject private parties to privacy legislation similar to the DPPA, it is valid under a "generally applicable law" exception created by *Garcia*. Brief for Petitioners at 37.

The Petitioners' argument rests upon the unsubstantiated claim that "generally applicable laws, by their nature," do not violate the commandeering principle disallowed in *New York* and *Printz* because they never "require the states to participate in the regulation of private persons." Brief for the Petitioners at 37. But, as demonstrated above, whether or not Congress directed the states to regulate private parties was never the *sine qua non* for the holdings in *New York* and *Printz*. Further, this is a peculiar interpretation of *Garcia*; *Garcia* never said any such thing, and *New York* and *Printz* never suggested that *Garcia* was decided on that basis. Instead, the argument derives from the dissent below, where Judge Phillips attempted to recharacterize *Garcia* and *Baker* in light of this Court's

subsequent federalism decisions. *See Condon*, 155 F.3d at 468 (Philips, J., dissenting).

Interestingly, the dissent below correctly pointed out that, if the states do hold a special place in our federal system, it is absurd to postulate that federalism is not offended so long as the states are subject to the same laws as private entities. *Id.* at 467-68. Otherwise, Congress could invade state sovereignty at will simply by broadening its legislation to reach private entities as well as the states. Therefore, it is impossible legitimately to contend that the constitutionality of a federal statute rests upon such a dubious premise. There is no way to finesse the fact that *Garcia* stood for an extraordinarily broad proposition:

> [S]pecial restraints on federal power over the States inhered principally in the workings of the National Government itself, rather than in discrete limitations on the objects of federal authority. State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.

Garcia, 469 U.S. at 552. Thus, *Garcia* held that the states could only rely on their necessary involvement in the national political process to ensure that Congress would not overstep its proper boundaries. But the problem with *Garcia* is that the limitations on federal power, properly acknowledged by this Court's prior decision in *National League of Cities v. Usery*, 426 U.S. 833 (1976) (overruled by *Garcia*), were not themselves "judicially created," even if the test for determining those limitations were. Rather, as this Court's subsequent decisions in *New York*, *Printz*, and *Alden* have explained, the limitations on federal power, both within and without the context of the Tenth Amendment and state sovereignty, inhere in the Constitution itself. *See New York*, 505 U.S. at 156-57;

Printz, 521 U.S. at 905, *Alden*, 119 S. Ct. at 2246. Thus, the majority's approach in *Garcia* holds that judicial resolution of a Tenth Amendment challenge ultimately can be arrived at *not* by resort to constitutional analysis, but simply by reference to what the federal government has in fact already done.

In light of this Court's more recent federalism jurisprudence, the rationale of *Garcia* can no longer be regarded as sound. Indeed, in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 119 S. Ct. 2219 (1999), this Court appeared to disavow *Garcia*'s broad rationale by stating that

> to say that the degree of [governmental power] dispers[ed] to the States, and hence the degree of check by the States, is to be governed by Congress's need for "legislative flexibility" is to deny federalism utterly.

Id. at 2233. That is, national government processes, deemed by the *Garcia* Court to be the only check on federal intrusion into state matters, is not, or is no longer, the proper test of assessing the constitutional validity of a statute in the face of a federalism challenge.

As a result, *Garcia* does not aid the Petitioners for three reasons: it does not apply in the present factual context, it does not stand for what the Petitioners claim, and the continued viability of what it *did* stand for is questionable. And while the present case may not present a suitable "occasion to apply or revisit the holding[]," *New York*, 505 U.S. at 160, of *Baker* or

Garcia,[7] the Petitioners' attempts here to reformulate *Garcia* into something it is not should be flatly rejected by this Court.

New York, *Printz*, *Alden*, and *College Savings Bank* all recognize that the constitutional principle of federalism places substantive limits on the ability of Congress to legislate in any way it chooses. More importantly, preserving federalism is critical because separating the federal government from state governments preserves individual freedom. The ability to retain that freedom is completely obliterated, however, if the federal government can simply displace a state's own management of state affairs with federal laws. When every state must administer its state programs according to one blanket federal dictate, states lose their uniqueness, indeed the very qualities that make a state a sovereign, and not a "mere political subdivision [ ] of the United States." *New York*, 505 U.S. at 188. It no longer matters that the states are divided by geographical boundaries if the boundaries do not also evidence a political boundary in which different groups of citizens are entitled to govern themselves by different laws.

Because the DPPA is not compatible with the federal structure of our government, this Court should affirm the decision of the Court below that the DPPA is unconstitutional on its face.

[7] However, the split in the court below as well as the conflict in the circuits on the constitutionality of the DPPA indicates that the federal courts need additional guidance from this Court upon the proper interpretation and continued validity of *Garcia*. *See, e.g., West v. Anne Arundel County, Maryland*, 137 F.3d 752, 757-60 (4th Cir. 1998) (Court asked for additional briefing on, and addressed in its decision, the continued validity of *Garcia* in light of *Printz*.)

C. The DPPA Violates the Guarantee Clause Because It Deprives State Citizens of the Ability to Establish the Policies Under Which Their Own State Agencies Operate

Article IV, Section 4, of the Constitution provides that "[t]he United States shall guarantee to every state in this union a republican form of government." Though the Guarantee Clause, as it is known, has been "an infrequent basis for litigation throughout our history," *New York*, 505 U.S. at 184, there is in that provision the expression of a federalism interest that is protected by the Constitution.

> The states cannot enjoy republican governments unless they retain sufficient autonomy to establish and maintain their own forms of government. The guarantee clause, therefore, implies a modest restraint on federal power to interfere with state autonomy.

Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Col. L. Rev. 1, 2 (1988).

> By the constitution, a republican form of government is guarantied to every state in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves.

Duncan v. McCall, 139 U.S. 449, 461 (1891). The Guarantee Clause provides further support for the principle that the Constitution protects South Carolina's operation of its own state government from federal encroachment.

As this Court explained in *Printz*, the Guarantee Clause

> presupposes the continued existence of the states and . . . those means and instrumentalities which are the creation of their sovereign and reserved rights.

Printz, 521 U.S. at 919 (citation omitted). In *Gregory v. Ashcroft*, 501 U.S. 452 (1991), as well, this Court elaborated on the rights protected by the Guarantee Clause. *Gregory* addressed whether the federal Age Discrimination in Employment Act applied to state judges, who, under the Missouri State Constitution, were required to retire at the age of 70. *Gregory*, 501 U.S. at 455. This Court applied a "plain statement rule," holding that, because Congress did not clearly express its intent to override the interests of the people of the State of Missouri in defining the qualifications of their constitutional officers, the Act would not apply. *Id.* at 461.

While this Court acknowledged that there exist some limitations on the ability of states to define the qualifications of their own state officials,[8] it nonetheless announced that its

> "scrutiny will not be so demanding where we deal with matters resting firmly within a State's constitutional prerogatives." [Citation omitted.] This rule "is no more than . . . a recognition of a State's constitutional responsibility for the establishment and operation of its own government."

[8] The primary limitation recognized by *Gregory* on the ability of states to select the qualifications of their own officials was the Equal Protection Clause. *Gregory*, 501 U.S. at 462. Indeed, the Court stated that, had Congress intended to regulate the retirement age of state justices, the law "would upset the usual constitutional balance of federal and state powers." *Id.* at 460. Thus, *Gregory* suggests that only constitutional provisions, and not congressional acts, can limit the power of states to determine the operation of their own governments.

Gregory, 501 U.S. at 462. This broad power of states to define who can hold state office

> is an authority that lies "'at the heart of representative government.'" It is a power reserved to the States under the Tenth Amendment and guaranteed them by that provision of the Constitution under which the United States "guarantee[s] to every State in this Union a Republican Form of Government."

Id. at 463 (citations omitted).

Thus, the Guarantee Clause provides a specific textual basis for the principle, well-established by this Court in *New York* and *Printz*, that state governments are uniquely immune from the imposition of federal mandates on the operation of state governments. And though the DPPA, unlike the statute at issue in *Gregory*, does not impose limitations upon the ability of state citizens to determine the qualifications of state officials, the Guarantee Clause issue that arose in *Gregory* dictates the result in this case: state citizens have broad authority to determine how their own state agencies ought to function. As Judge Rymer explained in her concurring opinion in *Bates v. Jones*, 131 F.3d 843 (9th Cir. 1997), in which the Ninth Circuit upheld a term limit initiative for state officials against a constitutional challenge,

> the Guarantee Clause restricts the federal government's power to interfere with the organizational structure and governmental processes chosen by a state's residents . . . . In order to ensure that state and local government remain responsive to their constituents, . . . citizens must have the power to choose the governmental forms that work best for them. *The guarantee clause, therefore, grants states control over their internal governmental machinery.*

Id. at 858 (citation omitted; emphasis added). Like *Gregory*, *Bates* dealt with the qualifications of state officials to hold state office. But Judge Rymer's understanding of the Guarantee Clause extends beyond that narrow context and includes the right of state citizens to have democratic control over their own government. Indeed, the right of state citizens to choose their state representatives is of no consequence if the federal government can nullify the authority of those representatives by dictating directly how a state government ought to conduct its official business. The power to choose a legislator is meaningless if a legislator has no power to establish the law.

Just as a state's citizens exercise their democratic will by defining who can hold state office and the qualifications of their elected officials, they also choose, through democratic processes, the laws and policies by which their state agencies and offices are run. And while every exercise of federal power can in some way force all state citizens to comply with national policies with which they disagree, the manner and means by which the DPPA acts upon the states is distinct from the usual form of federal law. Rather than imposing a policy directly upon a national constituency, who can respond through national political processes, the DPPA acts upon state government employees in their capacity as state employees. Not only do these employees have no special political recourse to the policies imposed by the federal government--that is, distinct from the general population--they are, unlike the general population, ultimately answerable to a state citizen constituency. Like the state legislature in *New York* and the law enforcement officers in *Printz*, the coercive obligations imposed upon these DMV employees under the DPPA places them in the untenable position of implementing federal policy at the behest of the federal government, but accountable to state citizens. And, as a consequence, the problem is the same: these government employees are not accountable to the individuals whom they serve. A republican form of government simply cannot exist

where one sovereign has the power to dictate the duties and obligations of another.

To establish accountability, state citizens must have the ability to impose their preferences upon their own state government. They also must have the ability to impress their preferences upon their state representatives in the national government. But what the state citizens are incapable of doing in their capacity as state citizens is to influence *other* state's representatives in the national government. Here, South Carolina's state government representatives had no say in the DPPA. As for South Carolina's national representatives, even the strongest expression of their preferences could only yield them a disproportionately low representation in the governance of their own affairs. In the enactment of the DPPA, South Carolina's national congressmen and senators had no more say in the internal workings of their own state's DMV operations than representatives *from other states*. As a result, South Carolina's state citizens have been deprived of any real power to govern the conduct of their own government officials.

The DPPA purported to overturn the open records policies of 34 states. Odom and *Feder, Challenging the Federal Driver's Privacy Protection Act*, 53 U. Miami L. Rev. at 101. The Petitioners blithely fail to acknowledge that this conversely demonstrates that 16 states had laws in place making driver information confidential prior to the enactment of the DPPA. In fact, in the State of California, the DPPA made driver records *less* confidential than they were under state law. *See* 79 Op. Att'y Gen. No. 76 (June 10, 1996). This fact, standing alone, amply demonstrates that states are and have been perfectly capable of addressing citizens' privacy concerns--and perhaps of addressing them more forcefully and creatively than Congress has done in the DPPA. But unlike the DPPA these varied state policies were implemented by state legislators acting in response to and accountable to the people these policies govern. Thus, the real issue in this case is not whether keeping driver records

confidential is good policy, it is who ought to be making this policy decision.

As evidenced by South Carolina's open records law, and the state's historical understanding that this law makes DMV records public, South Carolina's citizenry believes that the public interest of South Carolina is served by a different set of policy choices than those selected by Congress in the DPPA. The DPPA overrides the interests of South Carolina's citizens by declaring that the majority's will can be frustrated by a federal law that prevents the disclosure of these records. This is in direct conflict with the concept of a "republican" form of government.

Because the DPPA abrogates the principle of federalism by depriving state citizens of the ability to govern their own state motor vehicle agency through their democratic will, this Court should find that the DPPA violates the constitutional principle of federalism as protected by the Guarantee Clause.

CONCLUSION

To be valid, an exercise of Congress' commerce powers must be directed at an activity that substantially affects interstate commerce. The DPPA, which regulates the dissemination of driver information from state DMVs, does not meet this fundamental standard. The State of South Carolina compiles driver information for legitimate regulatory purposes, and releases this information according to the state's own policy choices. The legitimate operation of state government does not constitute interstate commerce. Further, while Congress found that driver records can be used for commercial purposes by third parties, the DPPA does not regulate this commercial activity. Instead, the DPPA is directed at regulating the administration of South Carolina's motor vehicle records for all purposes, without regard to interstate commercial impacts. This broad regulation of state activity is not a valid exercise of Congress' commerce authority.

Consistent with the Constitution's system of dual sovereignty, Congress lacks authority to direct states to legislate according to federal instructions or to conscript state officials into administering a federal regulatory program. The federalism structure memorialized by the Tenth Amendment and the Guarantee Clause bars Congress from interfering with the states in the operation of state government, no matter how much Congress may disagree with state policies. The DPPA is an attempt to abolish independent state policy by forcing the states to reorganize their internal government machinery to conform to federal dictates. The DPPA forces the citizens of South Carolina to be governed by a federal policy with which they disagree in the operation of their own state government. This coercion is an affront to state sovereignty protected by the Tenth Amendment and the Guarantee Clause of the United States Constitution.

For these reasons, this Court should affirm the decision of the Court below, and hold that the DPPA is unconstitutional.

DATED: September, 1999.

Respectfully submitted,

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Supreme Court of the United States

Janet Reno, Attorney General, et al.,

Petitioners,

v.

Charlie Condon, Attorney General of South Carolina, et al.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

Brief of Amicus Curiae in Support of Respondent

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QUESTION PRESENTED

Does the Commerce Clause give Congress the power to regulate state governments directly?

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INTEREST OF THE *AMICUS*[1]

The Home School Legal Defense Association is a membership organization representing over 60,000 families and approximately 200,000 children. HSLDA's advocacy of its members' interest frequently involves litigation concerning a family's constitutional rights. It is the position of the organization that the interpretation of the Constitution according to the original intent of the Founders is the only safe basis for the preservation of limited government and all rights including those important to our association. Accordingly, HSLDA has begun the Original Intent Project to systematically research and advocate constitutional interpretation according to the principle of original intent.

In our first brief, we argued that principles of *dual sovereignty* kept probation officers from suing an unconsenting state for damages in its own courts on Commerce Clause grounds. *Alden v. Maine*, 119 S. Ct. 2240 (1999). In this brief, we argue that dual sovereignty prohibits Congress from directly regulating state governments through the Commerce Clause. In both briefs, our interest is simply to ensure that we secure the blessings of liberty for ourselves and our posterity. We believe this can best be achieved by faithful adherence to the original intent of the Constitution.

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[1] This brief was not authored in whole or in part by counsel for any party. It has been funded in its entirety by the *amicus curiae*. *See* Sup. Ct. Rule 37.6.

The *amicus curiae* requested and received the written consents of the parties to the filing of this brief. Such written consents, in the form of letters from counsel of record for the parties, have been submitted for filing to the Clerk of Court. *See* Sup. Ct. Rule No. 37.3(a).

SUMMARY OF ARGUMENT

When our Founders invented federalism, they created a system of *dual sovereignty*. The central principle of dual sovereignty is that each American is subject to two governments, but neither of those governments is subject to the other. "The Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States." *Printz v. United States*, 521 U.S. 898, 920 (1997), *quoting New York v. United States*, 505 U.S. 144, 166 (1992). The Driver's Privacy Protection Act, 18 U.S.C.S. §§ 2721-2725 (Law. Co-op. 1999) ("DPPA"), violates the fundamental of dual sovereignty because it subjects state governments to federal control.

There are exceptions to this rule of dual sovereignty. For example, our Founders were unable to solve the problem of slavery at the time the Constitution was drafted, and agreed to compromise—for the time being. The Civil War ended that uneasy truce. The Civil War Amendments placed certain limits on state power over life, liberty, and property, and authorized congressional action to enforce those limits. These amendments are the only *right* way for Congress to regulate states directly.

The Civil War Amendments were not intended to obliterate state sovereignty, however. Unfortunately, both this Court and Congress have run roughshod over state sovereignty during the last century. During the *Lochner* era, this Court struck down state legislation time and again. But the Court had hardly even begun to regret the excesses of that era before Congress took over the role of federal bully, largely by expanding its power under the Commerce Clause.

Of all the elastic clauses in the Constitution, the Commerce Clause is probably the most overextended. In this case, Congress has asserted that its power to regulate com-

merce "among the several states" gives it power to tell states how to structure their motor vehicle databases. Article I, § 8, paragraph 3 gives Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Our Founders intended Congress to have much more power over foreign commerce than over interstate commerce, but Congress cannot use its power over foreign commerce to tell a foreign government how to set up its databases. How, then, can Congress use its power to regulate interstate commerce to regulate the states themselves?

There may not be many Americans who know why the Constitution was framed the way it was. Perhaps some Americans would prefer to have Congress enact expedient solutions for every crisis of the day—but not us. It is popular to uphold the Constitution when the Bill of Rights is threatened, but it is just as important to uphold it by keeping each branch of government within its constitutional limits. Restraining Congress in this case may or may not be popular, but it is constitutionally required. We therefore urge this Court to preserve our freedom through federalism, and declare DPPA unconstitutional.

ARGUMENT

I.

OUR FOUNDERS ORIGINALLY INTENDED TO PROHIBIT DIRECT FEDERAL REGULATION OF STATE GOVERNMENTS

A. THE ORIGINAL INTENT OF THE FOUNDERS

Dual sovereignty lies at the very heart of our Constitution. As Justice Kennedy recently explained: "The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, *each protected from incursion by the other*." *U.S. Term Limits v. Thornton*, 514 U.S. 779, 838 (1995). (Kennedy, J., concurring) [emphasis supplied].

It was not always so. After the Revolution, the states had ratified Articles of Confederation that provided little power over states and none over individuals. It created a league, not a government, and it functioned—or failed to function—like any other treaty. The federalism that replaced it was a radical innovation in government—and one that has been radically successful. This case will help determine whether we keep the flame of federalism alive or allow it to be snuffed out by the fitful winds of expediency.

The flame of federalism was lit at the Constitutional Convention in Philadelphia in 1787, but not without effort. The large states and small states could not agree on how to form one central government that would adequately protect the interests of each. After weeks of frustration, Benjamin Franklin said:

> We, indeed, seem to feel our own want of political wisdom since we have been running about in search of it. We have gone back to ancient history for models of government, and examined the different forms of those republics which, having been formed with the seeds of their own dissolution, now no longer exist. And we have viewed modern States all round Europe, but find none of their Constitutions suitable to our circumstances.[2]

1 James Madison, *Journal of the Federal Convention* 259-260 (E.H. Scott ed., 1893) [hereinafter, Madison's Journal].

Diamonds are forged in the unimaginable heat and pressure of the Earth's interior. Our Constitution was forged in a Philadelphia furnace of summer heat and flaring tempers. James Madison explained it to Thomas Jefferson, when he sent him a copy of the new Constitution. Madison wrote:

> It was generally agreed that the objects of the Union could not be secured by any system founded on the principle of a confederation of sovereign states. A *voluntary* observance of the federal law by all the members could never be hoped for. A *compulsive* one could evidently never be reduced to practice; and if it could, involved equal calamities to the innocent and the guilty, the necessity of a military force, both obnoxious and dangerous, and, in general, a scene resembling much more a civil war than the administration of a regular government.

---

[2] Franklin went on to call the delegates to prayer: "In this situation of this assembly, groping as it were in the dark to find political truth, and scarce able to distinguish it when presented to us, how has it happened, sir, that we have not hitherto once thought of humbly applying to the Father of lights, to illuminate our understandings?" *Id.*

> Hence was embraced the alternative of a government which, instead of operating on the states, should operate without their intervention on the individuals composing them....

1 James Madison, *Letters and Other Writings of James Madison* 344 (Lippincott ed. 1865) [hereinafter, Madison's Writings] [emphasis in original].

The federalist breakthrough was *not* that the Constitution would add new "powers over people" to the limited "powers over states" that already existed under the Articles of Confederation. The idea was to substitute the one for the other. Alexander Hamilton explained that the Constitution marked the "difference between a league and a government" because it extended "the authority of the union to the persons of the citizens, — *the only proper objects of government.*" *The Federalist No. 15*, at 149 (A. Hamilton) (J. Hamilton ed. 1869) [emphasis supplied].

This was no idle comment. The Founders really intended to renounce federal power over the states at the same time they created federal power over individuals. James Madison expressed it thus: "[T]he local or municipal authorities form distinct and independent portions of the supremacy, *no more subject*, within their respective spheres, *to the general authority than the general authority is subject to them*, within its own sphere." *The Federalist No. 39*, at 259 (J. Madison) (J. Hamilton ed. 1869) [emphasis supplied].

The "spheres" that Madison refers to are not fragile soap bubbles, but indestructible states in an indissoluble union. *See, Virginia v. West Virginia,* 246 U.S. 565, 602 (1918). The federal jurisdiction, Madison insisted, "extends to certain enumerated objects only, and leaves to the States a residuary and *inviolable* sovereignty over all other objects." *The Federalist No. 39*, *supra*, at 259 (J. Madison) [emphasis supplied].

The fervent anti-federalists were ready to assume the very worst about every jot and tittle of the new Constitution. Yet even they failed to imagine that Congress could use Article I power to affect the internal policy or administration of the states. On the contrary, Col. William Richardson Davie stated in the North Carolina Ratification Convention, "There is not one instance of a power given to the United States, whereby the internal policy or administration of the states is affected." 4 Elliot 159, *supra*.

During the ratification debates, Charles Pinckney told the South Carolina House of Representatives that "the necessity of having a government which should at once operate upon the people, *and not upon the states*, was conceived to be indispensable by every delegation present." 4 Elliot's Debates on the Federal Convention 256 (2d ed. 1863) [emphasis added]. South Carolina would probably not have ratified the Constitution without Pinckney's assurance on this point. South Carolina has relied upon Pinckney's promise to this day. But DPPA breaks that promise.

B. Freedom Through Federalism

Not everyone agreed that dual sovereignty was the right solution. One ardent Virginia patriot objected to it strenuously. As the Virginia legislature gathered to consider ratification, Patrick Henry reminded them that "no man can serve two masters." 3 Elliot 233, 539, *supra*. But John Marshall turned this self-evident fact into a powerful argument for freedom and federalism.

Marshall did not question Patrick Henry's premise. Instead, he turned it inside out: "Are they [the federal and state

governments] not *both* the *servants* of the people?" 3 Elliot 233, *supra* [emphasis supplied].

Our Founders took the thesis of state sovereignty and its antithesis, national sovereignty, and forged a synthesis in which the *people* exercised ultimate authority. Justice Kennedy has recently elaborated on this theme:

> Though on the surface the idea may seem counter-intuitive, it was the insight of the Framers that freedom was enhanced by the creation of two governments, not one. "In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself." *The Federalist No. 51*, (J. Madison)....
>
> Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front. In the tension between federal and state power lies the promise of liberty.

United States v. Lopez, 514 U.S. 549, 576 (1995) (Kennedy, J., concurring).

The founding generation ratified the Constitution to secure the "blessings of liberty to ourselves and our posterity." U.S. Const. Preamble. They understood that government *rules* the people when its power is undivided; but when its power is divided, government *serves* the people.

Sadly, many modern Americans have never learned this lesson. We retain our Founders' words, but we lack their wisdom. Whenever a problem appears, we clamor for Congress to "solve" it for us. But, as Justice O'Connor has noted:

> [T]he Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may *resist the temptation* to concentrate power in one location as an expedient solution to the crisis of the day.

New York, 505 U.S. at 187 [emphasis supplied].

C. NATIONALISM V. FEDERALISM

This case pits national power against federalist principles. There is no force for nationalism like war, and America was effectively "at war" through most of the twentieth century. In addition to the two declared wars, there were Korea and Vietnam and all the other undeclared conflicts of the Cold War. There was even a "War on Poverty."

President Nixon declared "war" on inflation. He said, "The time has come for a new economic policy for the United States. Its targets are unemployment, inflation, and international speculation. And this is how we are going to attack those targets." Pub. Papers, Richard Nixon 1971, Pg. 886, Item 264, August 15 [emphasis supplied]. One of these targets turned out to be the State of Ohio.

Ohio had voted for a 10.6 percent pay increase for state workers, which exceeded Nixon's wage and price controls. Nixon's Pay Board refused to permit pay increases greater than 7 percent. Two state employees sued for back pay and the Ohio Supreme Court ordered the full amount to be paid. *State ex rel. Fry v. Ferguson*, 34 Ohio St. 2d 252, 298 N.E. 2d 129 (1973). The United States filed suit in federal court to keep Ohio from obeying a *mandamus* issued by the Ohio court.

The federal judge prohibited the State of Ohio from obeying its own judges by paying its own workers. This marked an unprecedented federal incursion into state sovereignty, which was appealed all the way to this Court. A majority of this Court upheld wage and price controls on the state. *Fry v. United States*, 421 U.S. 542 (1975). After all, if the nation declares "war" on inflation, it can hardly let the states make a separate peace.

Justice Rehnquist dissented, basing his objections squarely on the concept of dual sovereignty:

> Both [the Tenth and Eleventh] Amendments are simply examples of the understanding of those who drafted and ratified the Constitution that the States were sovereign in many respects, and that although their legislative authority could be superseded by Congress in many areas where Congress was competent to act, Congress was nonetheless not free to deal with a State as if it were just another individual or business enterprise subject to regulation.

Fry, 421 U.S. at 557 (1975) (Rehnquist, J., dissenting).

In hindsight, Nixon's wage and price controls were not such a great idea. This *amicus* believes they were bad economic policy and worse constitutional law. Declaring "war" on inflation led to constitutional absurdity—but, then, war is always a breeding ground for hysteria.

In 1975, Justice Rehnquist was a lone voice crying in the wilderness. His view briefly gained majority status in 1976, when this Court invalidated federal regulation of state employment practices. Rehnquist wrote:

> It is one thing to recognize the authority of Congress to enact laws regulating individual businesses necessarily subject to the dual sovereignty of the government of the Nation and of the State in which they reside. It is quite another to uphold a similar exercise of congressional authority directed, not to private citizens, but to the States as States.

National League of Cities v. Usery, 426 U.S. 833, 845 (1976).

D. The Renaissance of Dual Sovereignty

This federalist victory did not last for long. It was premised on a Tenth Amendment protection of "core governmental functions," rather than sovereignty as such, and it proved too subjective to protect much. Abandoning the effort to preserve the distinction, Justice Blackmun wrote the majority opinion in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

Justice Rehnquist wrote a short dissent to *Garcia*. It ended with a prediction: "I do not think it incumbent on those of us in dissent to spell out further the fine points of a principle that will, I am confident, in time again command the sup-

port of a majority of this Court." *Garcia*, 469 U.S. at 580. That prediction proved prophetic.

Our Founders wrote a tough Constitution, resilient enough to withstand the stress of history. The core principles of the Constitution have outlasted this century's challenges. The Berlin Wall fell in 1989. The "massive resistance" of racist state and local governments is a fading memory. The struggle to survive in the shadow of 10,000 Soviet missiles has been replaced by the struggle for—driver's privacy.

Dual sovereignty emerged from the ashes of *Garcia* in *Gregory v. Ashcroft*, 501 U.S. 452 (1991). *Gregory* did not overrule *Garcia*, but it applied *Garcia* in a way that upheld state sovereignty. "Indeed, inasmuch as this Court in *Garcia* has left primarily to the political process the protection of the States against intrusive exercises of Congress' Commerce Clause powers, we must be absolutely certain that Congress intended such an exercise." *Garcia*, 501 U.S. at 464 (citations omitted). Mere ambiguity was not enough to justify sacrificing state sovereignty.

Justice O'Connor explained why it was so important to preserve the autonomy of the states. She wrote: "Perhaps the principal benefit of the federalist system is a check on abuses of government power. The constitutionally mandated balance of power between the States and the Federal Government was adopted by the Framers to ensure the protection of our fundamental liberties." *Gregory*, 501 U.S. at 458 (internal quotation and citations omitted).

The next year, this Court issued the watershed opinion in *New York v. United States*, 505 U.S. 144 (1992). *New York* is explicit about the reason for limiting the power of Congress. Federalism is a means to the end of freedom. Justice O'Connor wrote:

> The Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.

New York, 505 U.S. at 181.

Justice Scalia extended the principle of dual sovereignty in *Printz v. United States*, 521 U.S. 898 (1997). Justice Scalia quoted *Gregory* with approval, "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Printz*, 521 U.S. at 921, *citing Gregory*, *supra*, at 458.

This Court's federalism is all about a freer and stronger America. Each time the federal government "solves" a problem, 50 state governments are shut out of the process. Sometimes, of course, it is only the federal government that is competent to act. South Carolina should not unilaterally send National Guard units off to Kosovo. But there are other areas—including, in our opinion, the protection of driver privacy—where we still need all 50 "laboratories of democracy."[3]

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[3] Ironically, the Department of Justice turns the venerable notion of 50 state laboratories experimenting with freedom inside out, and wants Congress to experiment on the states, instead. The Department says, "A constitutional rule precluding Congress from regulating state activity in or affecting commerce unless and until it enacts a law covering similar private activity would deprive Congress of the much-needed *ability to experiment* in addressing regulatory concerns in complex fields such as this one, and could have highly undesirable results." US Brief, p. 42 [empha-

If there had been any doubts about the seriousness of the Court's commitment to this "shining gem" of federalism, those doubts vanished when the Court issued three separate sovereign immunity rulings on one day—June 23, 1999: *Alden v. Maine*, 119 S. Ct. 2240 (1999); *College Savings Bank v. Florida Prepaid*, *supra*; and *Florida Prepaid v. College Savings Bank*, 119 S. Ct. 2199 (1999). Justice Kennedy wrote:

> By "splitting the atom of sovereignty," the Founders established two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it. . . . When the Federal Government asserts authority over a State's most fundamental political processes, it strikes at the heart of the political accountability so essential to our liberty and republican form of government.

Alden, 119 S. Ct. at 2265 [internal quotations and citations omitted].

DPPA asserts authority over the internal operations of state government. Alexander Hamilton would have labeled it "an invasion of the residuary authorities of the smaller societies." This Court reaffirmed Hamilton's analysis in *Printz* and *Alden*:

> It will not follow from this doctrine, that acts of the larger society which are *not pursuant* to its constitutional powers, but which are invasions of the residuary authorities of the smaller societies, will become the supreme

sis supplied]. The states are supposed to be the *laboratories* of democracy, not the *guinea pigs*.

> law of the land. These will be merely acts of usurpation, and will deserve to be treated as such.

The Federalist No. 33, at 226 (A. Hamilton) (J. Hamilton ed. 1869) [emphasis in original], *see Alden*, 119 S. Ct. at 2256; *Printz*, at 924.

Our Founders had a vision of a strong but *limited* central government. We needed that *strength* to end slavery and to hold an evil empire at bay. But we need *limits* to keep Congress from taking over the job of every state and local government. This Court should uphold those limits and strike down DPPA.

II.

DPPA Exceeds the Limited Power Our Founders Granted to Regulate "Commerce Among the Several States"

Given this Court's explicit enunciation of the principle of dual sovereignty over the last decade, this case is easy to decide. But even if this Court had not clearly articulated these structural protections for state sovereignty in general, the more specific limits of the Commerce Clause would compel the same result. As we shall show, the language and history of the Commerce Clause prove that it *cannot* be used to assert direct regulatory power over a state government.

A. The Text of the Commerce Clause is Quite Limited

The Commerce Clause appears in Article I, § 8, paragraph 3. The entire paragraph gives Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." According to the

text, Congress has no more Commerce Clause power to regulate *states* directly than it has to regulate *foreign nations* directly.

No one suggests that Congress can use its power to regulate commerce with Indian tribes to directly regulate the tribes themselves. No one suggests that Congress can use its power to regulate commerce with foreign nations to impose direct obligations upon foreign governments. Can Congress really use its power to regulate commerce "among the several states" to regulate the states themselves?

This Court should ask DPPA's supporters whether Congress's power over foreign commerce allows it to tell Mexico how to structure its databases. The answer, of course, is "no." This Court should then ask why the same words in the same sentence of the same paragraph of the Constitution should be understood to give Congress *more* power over state governments than it gives over foreign governments. DPPA's supporters cannot point to anything in the text or legislative history of the Commerce Clause that would support that claim. Neither can they point to any precedent for direct congressional regulation of a state government as such. Without text, purpose, or precedent to support it, DPPA must fail.

B. Our Founders Saw The Commerce Power As Very Limited

The chief architect of our Constitution argued that Congress' power over interstate commerce is *less than* its power over commerce with foreign nations. In the Virginia Ratification Convention, James Madison noted federal jurisdiction over "external objects" such as "foreign commerce," and carefully distinguished that from the "internal order" of the States. He then argued against the idea that Congress should have the same power over both. "Would it not be considered

as a dangerous principle in the British Government were the king to have the same power in internal regulation as he has in the external business of treaties?" 3 Elliot 515, *supra*.

Madison wrote, "In expounding the Constitution and deducing the intention of its framers, it should never be forgotten, that the great object of the Convention was to provide, by a new Constitution, a remedy for the defects of the existing one." 4 Madison's Writings 253, *supra*. While the Founders were eager to build up a strong national trade with foreign nations, their *domestic* concern was purely to prevent one State from stacking the deck against its neighbors.

Madison said, "It would be unjust to the States whose produce was exported by their neighbors, to leave it subject to be taxed by the latter." 2 Madison's Journal 539, *supra*. Wilson "dwelt on the injustice and impolicy of leaving N. Jersey, Connecticut &c any longer subject to the exactions of their commercial neighbors." *Id.* at *540*. John Mercer spoke to the same effect in the Convention. *Id.*. So did Thomas Dawes in Massachusetts, 2 Elliot 57-58 *supra*, Oliver Ellsworth in Connecticut, *Id.*, 189, 192, and Patrick Henry in Virginia, *Id.*, 158. Madison said it was necessary to remove "existing & injurious retaliations among the States." 2 Records of the Federal Convention of 1787, p. 451 (M. Farrand ed. 1911). James McHenry said, "Perhaps a power to restrain any State from demanding tribute from citizens of another State … is comprehended in the power to regulate trade between State and State." 2 Farrand 504. Madison argued, "[P]erhaps the best guard against an abuse of power of the States on this subject, was the right in the Genl. Government to regulate trade between State and State." 2 Farrand 588-89. Sherman stated that "The oppression of the uncommercial States was guarded agst. by the power to regulate trade between the States." 2 Farrand 308. Ellsworth said that "the power of regulating trade between the States will protect them agst. each other." 2 Farrand 359-60.

Madison expressed himself more clearly on this point later in life. In 1829, he wrote:

> Being in the same terms with the power over foreign commerce the same extent, if taken literally, would belong to [interstate commerce]. Yet it is very certain that it grew out of the abuse of the power by the importing States in taxing the non-importing, and was intended as a negative and preventive provision against injustice among the States themselves, rather than as a power to be used for the positive purposes of the General Government.

4 Madison's Writings 14, *supra*.

Our Founders very much wanted to keep the states from interfering with each other's trade, but they had no intention of giving away any other powers that states had previously exercised over economic matters. DPPA does not keep states from interfering with each other's trade. DPPA interferes with the states themselves. DPPA turns the Commerce Clause on its head and is therefore unconstitutional.

C. The Commerce Clause Must Never Be Misused to Violate the Guarantee of a "Republican Form of Government"

South Carolina is supposed to be governed by *South Carolina* voters, not by voters from Alabama, Alaska, Arizona, Arkansas, and so forth. If Congress could directly regulate the states under the Commerce Clause, then the states would no longer be self-governing states. That would violate at least the spirit of the Guarantee Clause. U.S. Const. Art. IV, § 4.

There *are* problems that can only be solved at the federal level, like junk mail. States cannot prohibit junk mail, since that would violate the Dormant Commerce Clause and interfere with the federal mail service. The only way to regulate the direct mail industry would be through federal legislation. We cannot think of any significant constitutional problems with a federal law prohibiting the direct mail use of certain kinds of database information, even if some of the databases were owned and operated by states. In such a case, Congress would be regulating commerce, not states.[4]

If citizens want to protect themselves from junk mail, they can lobby Congress for Commerce Clause legislation. But if they want to protect themselves from their own state governments, that choice is not available. They can rely upon the Civil War Amendments or else petition *that* government for redress of grievances. Nothing else will preserve a republican form of government in every state.

Federalism forces the states to grapple with important problems, which helps fulfill the guarantee that every state shall maintain a "republican form of government." The Constitution requires states to be more than couch potatoes watching C-Span. But this means the federal government must leave important problems for the states to solve. A number of states have filed *amicus* briefs with this Court, because these states view drivers' privacy as the kind of important problems that states ought to be able to solve. This is good news! It is first-hand evidence that government of the

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[4] It might be hard for Congress to enact such legislation over the well-funded opposition of the entire direct mail industry, but that is a structural protection of state's interests that is completely in line with the majority opinion in *Garcia, supra*. It is worth noting that the federal privacy acts that apply to the commercial sector do not prohibit the disclosure or sale of name and address information to private parties. *See, e.g.*, the Video Privacy Protection Act of 1988, 18 U.S.C. § 2710(b)(2)(D); the Cable Communications Policy Act of 1984, 47 U.S.C. § 551(c)(2)(C).

people, of the people, and for the people—*of the states*—has not yet perished from the land.

Vigorous state government is good for America, but a republican form of government in every state would be constitutionally required whether or not it happened to be useful. As Justice O'Connor has explained:

> Our task would be the same even if one could prove that federalism secured no advantages to anyone. It consists not of devising our preferred system of government, but of understanding and applying the framework set forth in the Constitution. "The question is not what power the Federal Government ought to have but what powers in fact have been given by the people." *United States v. Butler*, 297 U.S. 1 (1936).

New York, 505 U.S. at 157.

If citizens want to change their own state's laws, they should get involved in the political process. If they want to change some other state's laws, they should move there. Congress has no right to let the citizens of other states run the state of South Carolina. South Carolina is supposed to be governed by a South Carolina legislature elected by South Carolina voters, but DPPA turns it into a state governed by a United States Congress elected by voters from all 50 states. That is why DPPA is unconstitutional.

CONCLUSION

For the foregoing reasons your *amicus* suggests that due respect for the original intent of the Constitution requires affirmation of the decision below.

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In The

Supreme Court of the United States

JANET RENO, Attorney General of the United States, et al.,

Petitioners,

v.

CHARLIE CONDON, Attorney General for the State of South Carolina, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF AMICI CURIAE THE STATES OF ALABAMA, COLORADO, MONTANA, NEBRASKA, NEW HAMPSHIRE, NORTH CAROLINA, OKLAHOMA, PENNSYLVANIA, RHODE ISLAND, UTAH, VIRGINIA, AND WISCONSIN, IN SUPPORT OF THE RESPONDENTS

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QUESTION PRESENTED

Whether the Driver's Privacy Protection Act of 1994, 18 U.S.C. §§ 2721-25, contravenes constitutional principles of federalism?

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INTEREST OF AMICI CURIAE[1]

Amici Curiae State of Alabama and eleven other States submit this brief in support of Respondents because the States have a manifest interest in the questions presented by this challenge to the Driver's Privacy Protection Act, 18 U.S.C. §§ 2721-25 ("DPPA"). That Act has displaced their public policies to no less an extent than the policy of South Carolina, the State that brought this action. The DPPA singles out the States for a burden not imposed upon the private- or federal-sector entities that develop and maintain databases containing "personal information." Affirming the court of appeals and holding the DPPA unconstitutional will preserve each State's ability to set its own policy regarding public information.

The Court's determination of this case will have repercussions beyond the statute at issue here. The *amici* States have a substantial interest in pursuing the process-oriented protections of this Court's federalism jurisprudence. Congress may not single out States through laws that are not generally applicable; laws targeting States isolate them in the political process. Because the Court has held that judicial review under the Tenth Amendment is available when States demonstrate a failure in the national political process, the Court must carefully scrutinize a law, like the DPPA, that denies States their natural allies by targeting States for a unique burden. Accordingly, the *amici* States respectfully submit this brief to assist the Court in the determination of the federalism issues in this case.

SUMMARY OF ARGUMENT

As shown in the Brief of Respondents Charlie Condon and the State of South Carolina, the DPPA is unconstitutional under *Printz v. United States*, 521 U.S. 898 (1997), and *New York v.*

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[1] Letters evidencing the parties' consent to the filing of this brief were lodged with the Clerk. Pursuant to Supreme Court Rule 37.6, the *amici* States affirm that no counsel for any party in this case authored this brief in whole or in part; and, furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief, other than the designated *amici* States.

United States, 505 U.S. 144 (1992), because it requires the States to administer a federal regulatory scheme in violation of the Tenth Amendment and this Court's Tenth Amendment jurisprudence. Even if the Court finds that the DPPA does not "commandeer" the States, the DPPA is unconstitutional under the Tenth Amendment for yet another reason: because the DPPA singles out States for the imposition of a unique burden. This Court's Tenth Amendment decisions of the past fifteen years can be understood as establishing a jurisprudence of process-oriented federalism that looks to the ability of the political process to protect the States' interests. First, the Court has upheld laws that it considered (or the parties conceded) were generally applicable with only incidental application to the States on the ground that the political process is presumed to limit federal encroachment under those circumstances. Second, the Court has analyzed and invalidated federal laws that targeted States without imposing similar burdens on parties engaged in similar conduct throughout the private and federal sectors. The political process affords States little, if any, protection from federal encroachment under those circumstances. If the process-based protection is removed by allowing States to be targeted for discriminatory burdens simply because another law may or may not address a similar substantive area, to a greater or lesser extent, now or in the uncertain future, the States are left with neither substantive nor process-based protection.

The DPPA is such a law which targets States and it is therefore, as the court of appeals held, unconstitutional. Private- and federal-sector databases containing "personal information" are not subject to laws like the DPPA. Even if sectoral, *ad hoc* regulation of personal information theoretically could be aggregated to form a generally applicable scheme of laws, the statutes the United States cites do not carry the day, as a factual matter. The DPPA is not a law of general applicability even when considered in light of other existing privacy regulation. While other laws purport to regulate the dissemination of personal information held by certain private parties, they neither cover the same information nor apply in the same way to private parties as the DPPA applies to the States. Moreover,

disclosure of personal information held *by the federal government* is the rule rather than the exception. Thus, the DPPA cannot be characterized as a law of general applicability and must be held unconstitutional.

ARGUMENT

I. The Court Has Developed a Jurisprudence of Process-Oriented Federalism

Prior to *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), this Court protected State interests through substantive limitations on federal power. Thus, in *National League of Cities v. Usery*, the Court reserved certain "core areas" or "traditional governmental functions" of the State from federal interference. 426 U.S. 833, 845, 852-54 (1976). In *Garcia*, the Court overruled *National League of Cities*, 469 U.S. at 531, 546-47, and rejected the substantive approach in favor of process-oriented bases of protection:

> [W]e are convinced that the fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the "States as States" is one of process rather than one of result. Any substantive restraint on the exercise of Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the national political process rather than dictate a "sacred province of state autonomy."

469 U.S. at 554 (citing *EEOC v. Wyoming*, 460 U.S. 226, 236 (1983)).[2] Because the Court asserted only that the "national political process" provided "the *principal and basic* limit on

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[2] The United States suggests that "[t]he question here, then, is whether the particular legislation the respondents challenge – the DPPA – impermissibly interferes with the 'residuary and inviolable sovereignty' of the States." Pet. Br. at 45-46. The United States seems to silently assume either that passing such a test provides the only basis for affirming the court of appeals or that laws targeting States pass that test. Both assumptions are incorrect.

the federal commerce power," 469 U.S. at 556 (emphasis added) – rather than the exclusive safeguard – *Garcia* expressly reserved a judicial role for the enforcement of Tenth Amendment limitations upon Congress in those cases where a "process failure" undermined the primary safeguard. *See also id.* at 550 ("Apart from the limitation on federal authority inherent in the delegated nature of Congress' Article I powers, *the principal means* chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself.") (emphasis added); *id.* at 552 ("In short, the Framers chose to rely on a federal system in which special restraints on federal power over the States inhered *principally* in the workings of the National Government itself, rather than in discrete limitations on the objects of federal authority.") (emphasis added). In this respect, *Garcia* may be viewed as inviting the development of a new process-oriented jurisprudence of Tenth Amendment limitations. One may read the Court's post-*Garcia* cases as accepting that invitation.

In *South Carolina v. Baker*, 485 U.S. 505 (1988), the Court reaffirmed both that *Garcia* left the door ajar for judicial review and that *Garcia* contemplated evidence of a possible process failure as a prerequisite to judicial intervention. *Id.* at 512-13. The Supreme Court rejected South Carolina's challenge to section 310 of the Tax Equity and Fiscal Responsibility Act of 1982[3] because the State "ha[d] not even alleged that it was deprived of any right to participate in the national political process or that it was *singled out* in a way that left it *politically isolated* and powerless." *Id.* (emphasis added). In rejecting the challenge, the Court thus identified potential process failures that might justify judicial involvement: congressional action that "singled out" States or left them "politically isolated" in the national political process. Moreover, the Court cited as support for this proposition the famous footnote four of its decision in *United States v. Carolene Products Co.*, which laid the process-based foundation for judicial doctrines

[3] Pub. L. No. 97-248, 96 Stat. 596, *codified at* 28 U.S.C. § 103(j)(1) (1982).

protecting individual rights. 485 U.S. at 512-13 (citing *Carolene Products*, 304 U.S. 144, 152 n.4 (1938)).

In *Baker*, the Court also rejected an argument presented by the National Governors' Association ("NGA"), an intervenor in the case. NGA argued that the statute at issue constituted a "commandeering" that violated the Tenth Amendment "by coercing States into enacting legislation authorizing bond registration and into administering the registration scheme." 485 U.S. at 513. In rejecting NGA's argument, however, the *Baker* court did not close the door to such a challenge in an appropriate setting, noting that the availability of such a "commandeering" claim "is far from clear" and that the Court did not need to address the constitutional issue because the statutory provision at issue, section 310, did not present it. 485 U.S. at 513.

The Court rejected NGA's argument for two reasons. *First*, the Court characterized section 310 as a law that did not commandeer the State in any meaningful manner because administrative and sometimes legislative action to comply with federal standards regulating activity is a commonplace that presents no constitutional defect. *Baker*, 485 U.S. at 514-15. In light of the Court's reservation of judgment regarding the commandeering issue in the context of some other statute, however, this explanation does not seem to stand on its own. *Second*, the Supreme Court analyzed the legislation as a law of general applicability:

> Nor does § 310 discriminate against States. The provisions of § 310 seek to assure that *all* publicly offered long-term bonds are issued in registered form, whether issued by state or local governments, the Federal Government, or private corporations. Accordingly, the Federal Government has directly imposed the same registration requirement on itself that it has effectively imposed on States.

Baker, 485 U.S. at 526-27 (citation omitted).

In both *Garcia* and *Baker* the Court declined to intervene, but both cases involved statutes that the Court analyzed as laws of general applicability with only incidental application to States and local governments. *Garcia* addressed application of the Fair Labor Standards Act ("FLSA") to local municipal

transit workers when the FLSA was also applicable to federal and private sector employees. *Baker* addressed application of a tax-exemption provision for the issuance of bonds that was applicable to both federal and private sector bonds.[4]

Process-oriented federalism moved from the realm of theory to the realm of applied law in *Gregory v. Ashcroft*, 501 U.S. 452 (1991). *Gregory* referred to a line of federalism cases in which the Court protected State interests under the Eleventh Amendment only months following the *Garcia* decision. 501 U.S. at 460-61 (citing *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)). *Gregory* adopted *Atascadero*'s "plain statement rule" as the natural corollary to *Garcia*'s "process-based" rationale:

> We are constrained in our ability to consider the limits that the state-federal balance places on Congress' powers under the Commerce Clause [by *Garcia*]. But there is no need to do so if we hold that the ADEA does not apply to state judges. Application of the plain statement rule thus may avoid a potential constitutional problem. Indeed, inasmuch as this Court in *Garcia* has left primarily to the political process the protection of the States against intrusive exercises of Congress' Commerce Clause powers, we must be absolutely certain that Congress intended such an exercise. "[T]o give the state-displacing weight of federal law to mere congressional *ambiguity* would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests."

Gregory, 501 U.S. at 464 (citations omitted). In *Gregory*, the Court thus moved from discussing a Tenth Amendment jurisprudence involving some theoretical process-oriented constraints to actually identifying and enforcing such a constraint.

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[4] Neither *Garcia* nor *Baker* analyzed the issue of whether an extension of a previously-enacted statute to cover States posed a question different from that where the statute, as originally enacted, applies generally and only incidentally to the States. This case does not present that issue either.

In doing so, *Gregory* weakens any view that *Garcia* foreclosed judicial review.

The Court further developed its federalism jurisprudence with its decision in *New York v. United States*, 505 U.S. 144 (1992), in which the Court struck down certain provisions of a statute enacted pursuant to the Commerce Clause. The statute required States either to regulate the disposal of radioactive waste by a statutory deadline, or to take title to the waste. Much of the majority opinion in *New York* focused on the "co-option" of State legislatures through the "regulate or take title" provisions at issue:

> While the Framers no doubt endowed Congress with the power to regulate interstate commerce in order to avoid further instances of the interstate trade disputes that were common under the Articles of Confederation, the Framers did *not* intend that Congress should exercise that power through the mechanism of mandating state regulation.

505 U.S. at 180. The majority's emphasis may be explained as a response to Justice Stevens' dissent. *Id.* at 210-13 (Stevens, J., dissenting) (asserting the Constitution permits the federal government to issue direct commands to States). Because the majority's discussion of "co-option" may be so understood, *New York* may be read as relying on a different, process-oriented rationale. The *New York* decision did not purport to overrule either *Garcia* or *Baker*; instead the Court explained the "legislate or take title" provisions did not present "a case in which Congress has subjected a State to the same legislation applicable to private parties." *New York*, 505 U.S. at 160.

In *Printz v. United States*, 521 U.S. 898 (1997), the Court reaffirmed *New York* and struck down provisions of the Brady Act. *Printz* also extended the rule against co-option of State legislatures to include "commandeering" of States' executive officials. *See* 521 U.S. at 934. In doing so, the Supreme Court distinguished the situation presented by laws of general

applicability that apply only incidentally to States.[5] As in *New York*, the *Printz* Court explained that the Brady Act applied to the States exclusively and intentionally: "[W]here, as here, it is the whole *object* of the law to direct the functioning of the state executive, and hence to compromise the structural framework of dual sovereignty, such a 'balancing' analysis is inappropriate." 521 U.S. at 932.

There is much scholarly debate regarding the continuing validity of *Garcia* and *Baker*. One camp views *Garcia* and *Baker* to be effectively overruled or severely limited by *New York* and *Printz*.[6] A second camp views *New York* and *Printz* as creating a substantive anti-commandeering exception to *Garcia* and *Baker*.[7]

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[5] 521 U.S. at 932 ("Assuming all the mentioned factors were true, they might be relevant if we were evaluating whether the incidental application to the States of a federal law of general applicability excessively interfered with the functioning of state governments.").

[6] *E.g.*, Ronald J. Krotoszynski, Jr., *Listening to the "Sounds of Sovereignty" But Missing the Beat: Does New Federalism Really Matter?*, 32 IND. L. REV. 11, 13 (1998) ("*Garcia* appears to have died a horrible, but suitably inconspicuous, death."); Maxwell A. Miller & Mark A. Glick, *The Resurgence of Federalism: The Case for Tax-Exempt Bonds*, 19 MUN. FIN. J. 46, 64 (Winter 1999) ("*South Carolina*'s Tenth Amendment holding is simply no longer good law. . . . [R]ecent cases, notably *New York v. United States* and *United States v. Lopez*, have effectively overruled *South Carolina's* narrow view of Tenth Amendment guarantees." Those recent cases "are firmly based upon the premise that the Tenth Amendment embraces substantive, not merely procedural, states' rights."); John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1322 (1997) ("In these more recent cases, I conclude, the Court appears to have overruled *Garcia* sub silentio.").

[7] *E.g.*, Nicholas J. Johnson, *EPCRA's Collision with Federalism*, 27 IND. L. REV. 549, 555 n.33, 557-58 (1994) (observing that *New York* "represents a clear shift from the message of *Garcia*" toward a substantive protection like that of *National League of Cities* at least for commands to State legislatures); Rex E. Lee, *Federalism, Separation of Powers, and the Legacy of* Garcia, 1996 B.Y.U. L. REV. 329, 345 (1996) (asserting *New York* "ruled that Congress could not ' "commandeer" state governments

This case presents an opportunity to *harmonize* the Court's precedents by following a third approach. *Garcia* and *Baker* expressly contemplate the development of process-oriented limitations. *Gregory* is the natural first step in constructing a new Tenth Amendment jurisprudence grounded in this process-oriented approach. The clear statement rule ensures fair notice so that State and local governments have the opportunity to oppose legislation in the national political process before it is enacted. *New York* and *Printz* recognize a distinction between laws of general applicability that incidentally apply to States, on the one hand, and laws that do not apply in the same way to private parties as they do to States, on the other hand. The emphasis on the "commandeering" language of *New York* and *Printz* clouds this line of distinction.

Baker rejected a "commandeering" argument directed at a law the Court viewed as one of general applicability that had only incidental application to States while recognizing that some other form of commandeering might be improper. *New York* and *Printz* invalidated laws that "commandeered" the States in the context of statutes that were not generally applicable and that did not apply to States only incidentally. Thus, a dividing line may be drawn between generally applicable laws and laws that single out or target States; commandeering is valid or invalid depending on which side of that line it falls.

The "process-oriented" rationale underlying *New York* and *Printz* is more readily apparent when one considers the political effect of laws targeting constitutionally significant entities, such as the States. When laws target constitutionally significant entities, "the political constraints that prevent a legislature from passing crippling [laws] of general applicability are weakened, and the threat of burdensome [laws] becomes acute." *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 582-83 (1983). A review of the holding in *Baker* shows that the Supreme Court recognized that when the class of States "is singled out in a way that left it

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into the service of federal regulatory purposes' " but suggesting the decision "alter[s] the *Garcia* regime but little").

politically isolated and powerless" there was a claim that the national political process had failed. 485 U.S. at 512-13.

Another attraction of a "process-oriented" approach is that it accounts for a third set of cases – as yet unaddressed in the Court's Tenth Amendment jurisprudence – involving laws that neither rise to the level of a commandeering nor constitute laws that generally apply to private parties and the States in the same way. This third category of cases must exist, at least in theory, because even if a federal law does not command States to regulate individuals on behalf of Congress, that fact alone does not establish that the law is one of general applicability that only incidentally applies to States. The United States' suggestion that any statute that does not "commandeer" is one of general applicability was previously advanced by the United States in *Printz* as a basis for limiting the scope of *New York*. The United States argued:

> [The Petitioners cite] this Court's observation in *New York* that the statute then before it did not involve Congress's "subject[ing] a State to the same legislation applicable to private parties." 505 U.S. at 160. From that sentence, they infer that *any* federal statutory obligation falling particularly on state or local officials is unconstitutional. That argument, however, misapprehends the Court's concerns in *New York*, and it does not explain *why* constitutional principles of federalism are not implicated when the States are subjected to generally applicable legislation.
>
> What is significant for constitutional purposes about a statute of general application is that such enactment, by its nature, cannot constitute a directive to the States to formulate state policy in response to a federal command. Rather, by such a provision, the States (along with private parties) are required to adhere to a clearly articulated federal policy.

Brief for the United States at 23, *Printz v. United States*, 521 U.S. 898 (1997) (Nos. 95-1478 & 95-1503), *available in* 1996 WL 595005. This Court declined to accept the United States' argument in *Printz* and the Court should not now accept the

United States' double-speak as a means of limiting both *New York* and *Printz*. Rather, the constitutionally significant feature is precisely that such laws apply "in the same way" to constitutionally protected entities or activities as well as to the population at large.[8]

New York and *Printz* may be harmonized with *Garcia*, *Baker*, and *Gregory* as establishing a Tenth Amendment protection against laws that "target" States for a unique burden, rather than simply creating an "anti-commandeering" rule. "When a regulation applies both to state and private activity, the political checks on Congress' power to regulate private activity provide vicarious protection for state interests and make Congress politically accountable. . . . [S]tate interests are protected because they are included in the representation of private interests." D. Bruce LaPierre, *The Political Safeguards of Federalism Redux: Intergovernmental Immunity and the States as Agents of the Nation*, 60 WASH. U.L. REV. 779, 1000-01 (1982).

More textual support for this view is found in both *New York* and *Printz*. In *New York*, the Supreme Court noted that the "legislate or take title" provisions did not present "a case in which Congress has subjected a State to the same legislation applicable to private parties." *New York*, 505 U.S. at 160. In *Printz*, the Supreme Court used similar language to make clear that its analysis focused on the intentional and exclusive imposition of burdens on States by the Brady Act: "[I]t [was] the whole *object* of the law to direct the functioning of the state executive, and hence to compromise the entire structural framework of dual sovereignty." *Printz*, 521 U.S. at 932.

In an accompanying footnote, the *Printz* Court addressed the dissent's assertion that Congress could have placed reporting obligations on the States' police officers if Congress had legislated generally so that those requirements fell only *incidentally* upon States' officers. The Court adopted that suggestion as "undoubtedly true" but explained that the Brady Act

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[8] The United States proposed this standard below. U.S. Brief at 19, *Condon v. Reno*, 155 F.3d 453 (4th Cir. 1998).

imposed additional burdens on State officers for which there was no private-sector counterpart. *Id.* at 932 n.17. That dialogue demonstrates that the Brady Act was not a law that merely subjected States to the same obligations as private parties.

The law at issue in *Printz* did apply to private individuals. It simply did not apply to them *in the same way* that it applied to State and local officials:

> The Gun Control Act of 1968 (GCA), 18 U.S.C. § 921 et seq., establishes a detailed federal scheme governing the distribution of firearms. *It prohibits firearms dealers from transferring handguns* to any person under 21, not resident in the dealer's State, or prohibited by state or local law from purchasing or possessing firearms, § 922(b). *It also forbids possession of a firearm by, and transfer of a firearm to,* convicted felons, fugitives from justice, unlawful users of controlled substances, persons adjudicated as mentally defective or committed to mental institutions, aliens unlawfully present in the United States, persons dishonorably discharged from the Armed Forces, persons who have renounced their citizenship, and persons who have been subjected to certain restraining orders or have been convicted of a misdemeanor offense involving domestic violence. §§ 922(d) and (g).

Printz, 521 U.S. at 902 (emphasis added). The 1993 amendments, specifically the Brady Act's amendments to the Gun Control Act of 1968, similarly imposed obligations on private individuals. However, the Brady Act did not apply *in the same way* to private individuals and States:

> Under the interim provisions, *a firearms dealer* who proposes to transfer a handgun must first: (1) receive from the transferee a statement . . . ; (2) verify the identity of the transferee . . . ; and (3) provide the "chief law enforcement officer" (CLEO) of the transferee's residence with notice of the contents (and a copy) of the Brady Form. . . . With some exceptions, the dealer must then wait five business days before consummating the sale, *unless the CLEO earlier notifies the dealer* that he has no reason to believe the transfer would be illegal.

Printz, 521 U.S. at 902-03 (emphasis added). Adopting that reading makes clear that the protection of State interests reaches the set of laws that single out States rather than the set of laws that "commandeer" States. It was not necessary to show a commandeering in *Printz*. The Court's focus was as much on the Brady Act's dissimilar application to public and private parties.

This view is further consistent with First Amendment jurisprudence. *See, e.g., Cohen v. Cowles Media Co.*, 501 U.S. 663, 669-70 (1991) (upholding application of promissory estoppel to the press because that law imposes similar burdens on everyone); *Employment Div., Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872, 878-80 (1990) (upholding application of prohibition of drug use to "religiously inspired peyote use" because that law imposes similar burdens on everyone).[9] When broadly applicable laws are applied to protected entities or activities they may be upheld as long as such applications are merely "incidental effects." *Cohen*, 501 U.S. at 669; *Smith*, 494 U.S. at 878. Thus, in *Minneapolis Star & Tribune*, the Supreme Court held that a law which "singled out the press for special treatment" was not merely a law of "general applicability . . . to all businesses" and, instead, placed "a heavier burden of justification" on the government. 460 U.S. at 582-83. When the press is singled out, "the political constraints that prevent a legislature from passing crippling [laws] of general applicability are weakened, and the threat of burdensome [laws] becomes acute." *Id.* at 585.

Laws that target religion are also constitutionally suspect. In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), the Court unanimously agreed with that proposition. Justice Kennedy's opinion for the Court explained that "the principle of general applicability was violated because the secular ends asserted in defense of the laws were

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[9] The Court unanimously agreed with this proposition in *Smith* and split only on the issue of whether the Constitution required *additional* protection of the targeted group.

pursued only with respect to conduct motivated by religious beliefs." *Id.* at 524. The prohibition "only against conduct motivated by religious belief" gave " 'every appearance of a prohibition that society is prepared to impose upon [Santeria worshipers] but not upon itself' " and that "precise evil is what the requirement of general applicability is designed to prevent." *Id.* at 545-46.

The analogy between First Amendment jurisprudence and Tenth Amendment jurisprudence further illustrates that a nexus is required between the harm sought to be addressed and the law adopted in order for a law to be properly classified as a law of general applicability. In *City of Hialeah,* Justice Kennedy observed that laws were not generally applicable when they were substantially (and not inconsequentially) underinclusive of the governmental interests identified in support of the laws. 508 U.S. at 543 (Kennedy, J.). Other sources of the harm were not covered by the laws there challenged. Similarly, neither the DPPA nor any other federal law purports to limit disclosure of names and residential addresses broadly throughout the private sector. Congress did not limit access to federal governmental sources of the same information that were identified at the congressional hearings. *See* Part II(A) *infra*. Moreover, the fact that the DPPA sweeps so broadly, "proscrib[ing] more . . . conduct than is necessary to achieve their stated ends," *id.* at 538, further demonstrates that it invalidly imposes unique burdens on the targeted entities, States. The failure to permit States to allow access to records by the press and government watchdog groups, for example, has no discernable relation to the harms Congress sought to address.

From *Garcia* to *Baker*, to *Gregory*, to *New York* and *Printz*, the Court has developed a jurisprudence of process-oriented federalism which imposes procedural requirements on Congress not specifically spelled out in the text of the Tenth Amendment but nevertheless necessary to preserve the autonomy of the States. Congress may not single out the States for a unique burden, but is required to promulgate its policies through laws of general applicability that apply to States and private actors in the same way. Because the DPPA is not such a law, the court of appeals properly found it unconstitutional.

II. The DPPA Is Unconstitutional under the Tenth Amendment Because it Singles out States for a Unique Burden

Even if the DPPA does not "commandeer," it clearly targets the States for unique burdens. The DPPA purports to instruct States how to control dissemination of information from State motor vehicle records compiled through the licensing of drivers and the registration of automobiles. The legislative history demonstrates that the impetus for the DPPA was to close access to names and residential addresses that could be used by stalkers. However, the law does not address the same information – names and residential addresses – when that information is disseminated from private-sector and federal databases. The text and history of the DPPA show that the imposition of that unique burden was intentional rather than incidental.

A. Federal Regulation of Personal Information Is Sectoral, Not Generally Applicable, and Does Not Aggregate to Form a Law Of General Applicability[10]

The overwhelming majority of the sources of personal information are left unregulated by the United States'

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[10] The United States asserts that the rule adopted by the court of appeals requires Congress "to address privacy concerns in all private and public records *in a single statute*." Pet. Br. at 43 (emphasis added); see *id.* at 34. The United States further asserts that the court of appeals simply dismissed as "irrelevant" the asserted similarity between the DPPA and other laws purportedly regulating data protection. *Id.* at 14, 24. These assertions misread the approach of the court of appeals and interject an issue not presented by this case. The court of appeals never reached the issue of whether "Congress may enact a statute regulating the States if it has already enacted a statute regulating the same conduct by private parties." Pet. App. 19a. The court found that it did not need to decide that legal issue because even considering the congressional regulation of certain narrow categories of private actors, the most that could be said was that

"sector-by-sector" approach to data protection. The DPPA's legislative history shows that Congress was advised that State motor vehicle records were only one of many sources of similar information potentially subject to misuse by criminals. The testimony before Congress made clear that other records contained much of the same information as motor vehicle records and had been similarly misused to facilitate stalking and other crimes. Congress was well-informed that it was the relatively easy access to "government records" that facilitated stalking. For example, Subcommittee hearings demonstrated that "the post office and the DMV will divulge the address of the victim's hiding place – no questions asked." Hearings on H.R. 3365 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, *available in* 1994 WL 14168013 (Feb. 3, 1994) (statement of David Beatty). Yet Congress responded with a provision imposing upon States the burden to restrict access to motor vehicle records while ignoring many of the federal- and private-sector sources of the same information.

The primary sponsor of the DPPA made express reference to a book entitled "You Can Find Anyone" that was found in a stalker's possession. 139 Cong. Rec. S15,762 (daily ed. Nov. 16, 1993) (statement of Sen. Boxer). The Senator expressed her concern that the book "spelled out how to do just that using someone's license plate." *Id.* The Senator did not mention, however, that the very same book identified numerous federal sources that supply the same information to potential stalkers, including the Federal Communications Commission, Federal Aviation Administration, Internal Revenue Service, Interstate Commerce Commission, Civil Service Commission,

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"Congress has enacted several laws of limited applicability." *Id.* Thus, even if one could aggregate numerous laws to form one scheme that was generally applicable, that factual predicate is absent in the context of data protection. *See id.* Demonstrating this very different explanation than that offered by the United States, the court of appeals observed: "we seriously doubt that the Supreme Court would have applied either the FLSA or the ADEA to the States had Congress applied those Acts only to video stores, cable providers, and credit bureaus." *Id.*

and the Armed Services Locators. *See* EUGENE FERRARO, YOU CAN FIND ANYONE, § 4.5, at 76-79, 81 (10th ed. 1989).

Perhaps the most telling and most analogous source of disclosure is the Federal Aviation Administration ("FAA"). A database of the operators of vehicles licensed by the federal government (in this case, aircraft) is available on the Internet, providing names, home addresses, and information regarding physical examinations. *See* Pet. App. 25 n.9 (citing AVweb, U.S. Certified Airman Database (visited Aug. 13, 1999) <http://www.avweb.com/database/airmen/>). A related database permits anyone to obtain the name and address of the owner of an airplane simply by providing the "N-number" required to be displayed on the airplane's tail. *Id.* (citing AVweb, U.S. Registered Aircraft Database (visited Aug. 13, 1999) <http://www.avweb.com/database/aircraft/>). This information originates with the FAA and is disseminated by a company under contract with the FAA.

Similarly, when individuals register certain boats with the United States Coast Guard, it appears that the federal government discloses the information collected. CAROLE A. LANE, NAKED IN CYBERSPACE: HOW TO FIND PERSONAL INFORMATION ONLINE 160 (1997). If the Coast Guard fails to do so, the FCC may disclose the information if the boat owner registers a ship-to-shore radio. *Id.*

The United States Postal Service ("USPS") remains an easy source of forwarding addresses. Although the USPS recently discontinued its disclosure to individuals of a list of all requests to forward mail, it still discloses the information one entry at a time. To obtain a forwarding address, one need only send a letter to the former address with instructions on the envelope not to forward the mail and to provide address correction. RICHARD S. JOHNSON, HOW TO LOCATE ANYONE WHO IS OR HAS BEEN IN THE MILITARY 236 (7th ed. 1996). Moreover, the Postal Service continues to sell data collected from Change of Address forms to mailing-list firms, direct mailers, and credit bureaus. BETH GIVENS, THE PRIVACY RIGHTS HANDBOOK: HOW TO TAKE CONTROL OF YOUR PERSONAL INFORMATION 128 (1997).

In some instances, the United States orders private parties to disclose residential addresses to other private parties. For example, the federal government routinely mandates disclosure of names and residential addresses to collective bargaining representatives. *See NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766-67 (1969); *Lear Siegler, Inc. v. NLRB*, 890 F.2d 1573, 1580-81 (10th Cir. 1989). Although the Court has held that collective bargaining representatives of federal employees may not compel disclosure of names and residential addresses, the Court indicated that there was no constitutional bar to such disclosure. *See United States Department of Defense v. FLRA*, 510 U.S. 487, 503 (1994) ("Congress may correct the disparity" in treatment of classes of unions). In that context, the federal government orders the disclosure of less-public information such as home telephone numbers and even Social Security numbers. *See NLRB v. Illinois-American Water Co.*, 933 F.2d 1368, 1377-78 (7th Cir. 1991) (Social Security numbers in addition to names and addresses); *NLRB v. Burkart Foam, Inc.*, 848 F.2d 825, 833 (7th Cir. 1988) (telephone numbers in addition to names and addresses); *Lucky Markets, Inc.*, 251 N.L.R.B. 836, 840 (1980) (names, ages, race, sex, and marital status).

The federal government provides virtually no protection for medical and health care records. *See* Paul M. Schwartz & Joel R. Reidenberg, Data Privacy Law 308 (1996) ("Schwartz & Reidenberg"). There is no comprehensive federal legislation regarding how employers must treat personal information they collect regarding their employees. *Id.* at 350. Further, there is no federal law addressing data protection specifically in the context of direct marketing. *Id.* at 308.

Ironically, in some ways, the federal government is acting to make personal information more available. For example, while the Fair Credit Reporting Act, Pub. L. No. 91-508, Tit. VI, § 601, 84 Stat. 1129, *codified at* 15 U.S.C. §§ 1681a-1681b (1994) ("FCRA"), limits information that may be disclosed about individuals, it does not prohibit the disclosure of names, residential addresses, or other personal information. The Federal Trade Commission ("FTC"), which is charged with administering the FCRA, specifically

excludes such data from its definition of "consumer reports" and permits unrestricted dissemination of this information so long as the data is not linked to credit information through "pre-screening." *See FTC v. TRW, Inc.*, 784 F. Supp. 361, 362 (N.D. Tex. 1991), *amended*, *FTC v. TRW, Inc.*, CIV No. 3-91-CV2661-H at 1 (Jan. 14, 1993). The FTC defines "pre-screening" as "the process whereby TRW, utilizing credit information, compiles or edits for a client a list of consumers who meet specific criteria." 784 F. Supp. at 362. The "header information" that the FTC permits to be freely disclosed includes "name, telephone number, mother's maiden name, address, zip code, year of birth, age, any generational designation, social security number, or substantially similar identifiers, or any combination thereof." *FTC v. TRW, Inc.*, CIV No. 3-91-CV2661-H at 1.[11] The FTC policy thus allows this information to be sold without limitation by credit bureaus. *See* Leslie Byrne, *Who's Selling Your Secrets? Government Units Sell or Give Away Personal Data*, Christian Science Monitor, June 17, 1997, at 19.

The Postal Service now proposes to *require* disclosure of name and address information of individuals who use commercial mail boxes in lieu of home addresses. *See* 64 Fed. Reg. 14,385 (1999); *see also* David Keene, *Postal Competitors Beware; The Mailman Cometh*, The Hill, June 23, 1999, at 18. One wonders how that requirement can be harmonized with a concern to guard against stalkers.

Federal agencies do not limit their disclosures to names and residential addresses. Despite the fact that an individual's Social Security number is often used as proof of permission to access other records, the federal government discloses Social

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[11] Moreover, credit reports may be purchased by anyone with a "permissible business purpose." *See* 15 U.S.C. § 1681b. "The FCRA defines permissible purposes broadly, encompassing employers, landlords, private investigators, and others." Information Policy Committee, National Information Infrastructure Task Force, *Options for Promoting Privacy on the National Information Infrastructure*, at 41 (Apr. 1997 draft), available at <http://www.iitf.nist.gov/ipc/ipc-pub.html> (visited Jan. 31, 1999) [hereinafter NIITF Draft].

Security numbers with little hesitation. "Since June 1974, the [Department of Veterans' Affairs] has used Social Security numbers as VA Claim numbers." JOHNSON, *supra*, at 89; *see also id.* at 6-7, 87-88, 206-07. Similarly, "the Armed Forces switched from using Service Numbers to using Social Security numbers as a means of identification" in July 1969 (Army and Air Force), July 1972 (Navy and Marine Corps) and October 1974 (Coast Guard). *Id.* at 135. Consequently, the name and Social Security number of individuals are published in unit orders, reassignment orders, orders for promotions, awards, and numerous other orders. *See id.* at 138. Moreover: "The Social Security numbers of many retired officers and warrant officers may be obtained from the Officer's Registers." *Id.* at 81.

Indeed, one need not go any farther than a law library to find a list of individuals' names and Social Security numbers. For decades, the United States Department of Labor has published the Social Security numbers correlated together with the names of claimants under the Black Lung Benefits Act. The Department of Labor assigns each claimant's Social Security number as its case number, resulting in public disclosure whenever a decision is designated for publication.[12] The United States government also makes a debtor's Social Security number a matter of public record when it petitions for a writ of garnishment to collect a debt. *See* 28 U.S.C. § 3205(b)(1)(A).

Other information frequently used as a means to test authorization to receive data is itself freely disclosed. For

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[12] Comparison of the "OWCP number" in published decisions with the claim filed in several of those cases confirms that practice. For example, the OWCP number reported in *Hite v. Eastern Associated Coal Corp.*, 21 Black Lung Rep. (MB) 1-47 (Ben. Rev. Bd. 1997), matches the miner's Social Security number as reflected in Director's Exhibit 3 filed therein. Similarly, the OWCP number reported in *Church v. Eastern Associated Coal Corp.*, 21 Black Lung Rep. 1-52 (Ben. Rev. Bd. 1997), correlates with the miner's Social Security number as reflected in Director's Exhibit 1 filed therein.

example, the National Personnel Records Center, in responding to individuals' Freedom of Information Act requests, provides a person's date of birth. *See* JOHNSON, *supra*, at 98, 146-47. That information is sufficient to permit the person to be located through a computer database. *See id.*; *see also id.* at 8-9, 11. Date of birth information is also publicly available from Selective Service classification records of men who registered for the draft from 1940 to 1975. *Id.* at 92.

These examples of sectors not subject to data protection limitations rebut the Seventh Circuit's mistaken impression that virtually all collections of data already are regulated by the federal government. *Travis v. Reno*, 163 F.3d 1000, 1005 (7th Cir. 1999). In fact, the federal government's own studies and scholars in the field generally reject this view. *See* Joseph I. Rosenbaum, *Privacy on the Internet: Whose Information is it Anyway?*, 38 JURIMETRICS J. 565, 569 & n.6 (1998) (citations omitted); *see also* SCHWARTZ & REIDENBERG, *supra*, at 215, 382 (federal data protection laws applicable to the private sector address only discrete issues; "existing legal protections tend to focus on access [by the subject of the record] and correction"); NIITF Draft, *supra*, at i ("Information privacy policy in the United States consists of various laws, regulations and practices, woven together to produce privacy protection that varies from sector to sector. . . . Sometimes this approach leaves holes in the fabric of privacy protection."). This consensus is not surprising in light of our strong political tradition of resisting limits on information dissemination. *See* Joel R. Reidenberg, *Setting Standards for Fair Information Practice in the U.S. Private Sector*, 80 IOWA L. REV. 497, 500-01 (1995). In the private sector, the United States generally favors the free flow of information. *See id.* at 503-06. Thus, even viewed as a whole, federal regulation of personal information in the private sector does not aggregate to form a generally applicable scheme.

B. The Statutes the United States Cites Do Not Impose Similar Burdens on Private or Federal Actors

The statutes the United States cites to suggest that there is a general scheme of personal information regulation do not support the premise. As the preceding examples demonstrate, federal limitations on the disclosure of information constitute exceptions rather than the general rule.[13] Moreover, even the few statutes frequently cited as imposing disclosure limitations "similar" to the DPPA generally fail to fulfill that claim. The cited statutes do not regulate in the same manner as the DPPA and none of the statutes imposes the same burdens on private actors as the DPPA imposes upon the States. Therefore, the sectoral approach to privacy regulation does not aggregate into a single generally applicable scheme even if such aggregation were sufficient to pass constitutional muster under the Court's process-oriented jurisprudence.

Arguing that Congress is not required to promulgate laws of general applicability, but may regulate privacy on a sector-by-sector basis, the United States invites the Court's attention to several laws purported to regulate personal information in specific commercial fields and the federal sector. *See* Pet. Br. at 40 nn.20, 21. These laws only prove the point that Congress has singled out the States for a burden it did not similarly impose on private actors or the federal government.

The Video Privacy Protection Act of 1988, Pub. L. No. 100-618, 102 Stat. 3195, *codified at* 18 U.S.C. § 2710 ("VPPA"), prohibits the disclosure of "personally identifiable information." 18 U.S.C. § 2710(b)(1). "Personally identifiable information" is defined as "information which identifies a

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[13] One author noted that the private sector in the United States is "virtually unregulated" for privacy, with the exception of the credit reporting industry, which is governed by the FCRA. COLIN J. BENNETT, IMPLEMENTING PRIVACY CODES OF PRACTICE 8, 42 (1995). Even that statute, however, has been interpreted to permit disclosure of personal information. *See supra* pages 18-19.

person as having requested or obtained specific video materials or services from a video tape service provider." *Id.* § 2710(a)(3). The definition of the protected information, however, parallels that of the FCRA: names and addresses may be disclosed as long as not pre-sorted or otherwise linked to convey additional information (such as credit history or tapes rented, respectively). In addition to exempting names and addresses from the definition of protected information, the VPPA also expressly allows the disclosure of names and addresses, so long as they are not tied to the title, description, or subject matter of the video tapes. *Id.* § 2710(b)(2)(D). Moreover, there is an express exception under which such information, including the subject matter of video rentals, may be released to direct marketers. *Id.* § 2710(b)(2)(D)(ii). Thus, even the law upon which the DPPA purportedly was based apparently does not restrict disclosure of names and residential addresses alone, unlike the DPPA.

The Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 2(c), 98 Stat. 2794, *codified at* 47 U.S.C. § 551(c) ("CCPA"), limits the disclosure by cable providers of "personally identifiable information" regarding cable subscribers. The statute notes that names and addresses of subscribers may be disclosed "to any cable service or other service" so long as the subscriber has the opportunity to prohibit or limit the disclosure and, like the similar VPPA provision, the disclosure does not reveal viewing or usage information. 47 U.S.C. § 551(c)(2)(C).

The Family Educational Rights and Privacy Act of 1974, Pub. L. No. 93-380, Tit. V, § 513, 88 Stat. 571, *codified at* 20 U.S.C. § 1232g ("FERPA"), prohibits the release of "educational records" by public and private educational institutions which receive funds from the federal government. 20 U.S.C. § 1232g(b). "Educational records" are defined as "those records, files, documents, and other materials which – (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution." *Id.* at § 1232g(a)(4)(A). But Congress specifically excluded from FERPA's nondisclosure provisions the student's name,

address, telephone listing, and date and place of birth, the type of information that the DPPA covers. *Compare* 20 U.S.C. § 1232g(a)(5) (defining "directory information" under FERPA) *with* 18 U.S.C. § 2725 (defining "personal information" under the DPPA). Moreover, Congress relied on its spending power for the FERPA; it did not *impose* the provision upon unwilling states.

As discussed *supra* page 18, unlike the DPPA, the FCRA has been construed by the FTC to permit disclosure of names and addresses.

The Right to Financial Privacy Act of 1978, Pub. L. No. 95-630, Tit. IX, 92 Stat. 3697, *codified at* 12 U.S.C. §§ 3401-22 ("RFPA"), prohibits financial institutions from disclosing to any agency or department of the United States, or to any federal agent, officer, or employee certain "financial records." 12 U.S.C. §§ 3401, 3402. There are numerous exceptions to the general prohibition on disclosure, mainly for law enforcement purposes, *see, e.g.*, 12 U.S.C. §§ 3402, 3404, 3405-08, 3413, 3414, and no provision prevents disclosure to private persons.

The Privacy Act of 1974, *codified at* 5 U.S.C. § 552a, applies only to the federal government itself. It does not purport to regulate individuals. Even within this scope of applicability, however, it does not function as written. "The enforcement, oversight, and scope of the Act are inadequate." George B. Trubow, *Protecting Informational Privacy in the Information Society*, 10 N. Ill. U.L. Rev. 521, 530 n.4 (1990) (citation omitted). Even on its face, the "Act is also riddled with broad exceptions that severely limit its usefulness." *Id.* Few of the laws self-imposed upon the federal government produce general compliance. For example, in 1990, the General Accounting Office reported that only 35% of federal databases containing personal data had been identified in the Federal Register as required. Wayne Madsen, Handbook of Personal Data Protection 109 (1992). Of the computer systems engaged in "computer matching" of information, very few complied with federal regulations and procedures. *Id.*

The Americans with Disabilities Act of 1990, Pub. L. No. 101-336, Tit. I, § 102, 104 Stat. 331, *codified at* 42 U.S.C. §§ 12101-12213 ("ADA"), prohibits the release of a job applicant's medical information except to supervisors, first aid and safety personnel – if the applicant's disability may require emergency treatment – and government officials investigating ADA compliance. 42 U.S.C. § 12112(d)(3). It does not purport to restrict the dissemination of names and residential addresses alone.

The Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848, *codified at* 18 U.S.C. § 2511 ("ECPA"), is the federal wiretap statute. The United States cites subsection 2511(3) as providing protections analogous to the DPPA, but that subsection merely provides limitations on the disclosure of *the contents* of electronic communications[14] by the electronic communication service provider. There is no provision addressing personally identifying information of the type covered by the DPPA.

Similarly, the Employee Polygraph Protection Act of 1988, Pub. L. No. 100-347, § 9, 102 Stat. 652, *codified at* 29 U.S.C. § 2008 ("EPPA"), provides that a person "may not disclose information obtained during a polygraph test" except to the subject of the test, her employer, or a judicial body pursuant to a court order. The EPPA does not address personal information of the sort covered by the DPPA, but instead, is limited to the specific context of polygraphy and the information obtained during such a test.

The laws the United States cites differ from the DPPA in that they do not prohibit disclosure of names and addresses

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[14] " '[E]lectronic communication' means any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature, transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce, but does not include – (A) any wire or oral communication; (B) any communication made through a tone-only paging device; (C) any communication from a tracking device . . . ; or (D) electronic funds transfer information stored by a financial institution in a communications system used for the electronic storage of such funds." 18 U.S.C. § 2510(12).

alone. The DPPA attempts to prohibit the disclosure of the name, address, and telephone number of the subject of the record, while the FCRA, FERPA, VPPA, and CCPA allow disclosure of that same information. The ADA, EPPA, ECPA, and RFPA do not purport to regulate such information. The United States contends that different contexts require different approaches, but has failed to explain why, on the one hand, names, addresses, and Social Security numbers should be available from credit reporting agencies, but, on the other hand, dissemination of the same information from motor vehicle records is criminalized. Likewise, the United States fails to explain why names, addresses, and medical information linked to displayed registration numbers on vehicles should be available from the federal government but the same information cannot legally be obtained from the States.[15]

An analysis of the laws the United States cites reveals that they are not similar to the DPPA so that they could be considered individual "panels" in an aggregated "quilt" of federal privacy regulation. *See* Pet. Br. at 21. Rather, the DPPA is the stain that stands out on a quilt of an entirely different background color.

C. Congress May Not Justify Burdens upon the States As the "First Step" in a Purported *Ad Hoc* Regulatory Scheme

When enacting laws which implicate State autonomy, Congress may not impose unique burdens upon States under the pretext that such regulation is merely the first step in

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[15] Moreover, the statutes do not impose similar burdens upon the parties affected. The DPPA requires States to determine whether a particular request falls into the "may disclose," "may not disclose," or "must disclose" categories, and to act accordingly. Under the DPPA, the States may not, as the United States has asserted in the appellate courts, simply do nothing. The ECPA, EPPA, and ADA require the nondisclosure of information obtained in certain narrow circumstances, but they do not appear to call for any similar disclosure/nondisclosure determination by States.

developing a scheme of regulation that will apply more broadly. This Court has never upheld laws that target newspapers or the media or religion for a unique burden simply because the government claims it will eventually expand its regulation. Laws that burden constitutionally significant entities and activities must be examined as they are enacted, not as they might appear at some future date in the context of other hypothetical enactments. To permit otherwise eviscerates the distinction based upon laws of general applicability. The United States' citation to *Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 489 (1955), is simply misguided. *See* Pet. Br. at 39. That case involved a challenge under the Equal Protection Clause, not a challenge based on the Tenth Amendment. The *Lee Optical* principle has not been applied in the context of regulation of constitutionally protected activities or entities, like religion, the press, or States. The United States' argument that *Lee Optical* permits Congress to experiment upon States before imposing regulations upon the private sector (or the federal government itself) turns the traditional view of federalism on its head. It is the States which serve as laboratories, experimenting with different approaches.[16] *See Garcia*, 469 U.S. at 546 (quoting *New State Ice Cream Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J. dissenting)); *see also United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring). When Congress purports to instruct all States what standard must be applied, experimentation is terminated.

The process protections of this Court's Tenth Amendment jurisprudence do not permit Congress to "experiment" by singling out States for a unique burden, but rather require Congress to regulate by means of laws of general applicability that only incidentally affect the States. Thus, at the very most, Congress may regulate broadly throughout the

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[16] Moreover, the experimentation argument appears to be only a *post hoc* rationale for a law enacted as an eleventh-hour amendment to an omnibus bill comprising thirty-three different titles. The proposed DPPA generated no committee reports and the scant hearings were never published.

private and federal sectors, and then regulate the States.[17] After *Garcia*, States appear limited to process-based protections under the Tenth Amendment, rather than substantive review. If the process-based protection is removed by allowing States to be targeted for discriminatory burdens simply because another law may or may not address a similar substantive area, to a greater or lesser extent, now or in the uncertain future, the States are left with neither substantive nor process-based protection.[18] The Supreme Court's post-*Garcia* Tenth Amendment cases make clear that the Court recognizes that the Constitution imposes limitations on the Commerce Clause for the protection of States, even if the protection provided "is one of process rather than one of result." *Garcia*, 469 U.S. at 554. The United States' suggestion that the Court abandon process-based protections as well would eviscerate this Court's Tenth Amendment jurisprudence and leave States with no type of protection from congressional encroachment. For that reason, the United States' arguments must fail.

III. Congress Could Have Passed a Different Law That Would Pass Constitutional Muster to Reach the Same Result

Instead of singling out the States in violation of the Tenth Amendment, Congress could have enacted its policy in ways that do not run afoul of the Constitution. Under existing law, Congress could have used its spending power to give additional funding to States that administer their records in accordance with federal policy. Such an exercise of Congress' spending power would, of course, have to comply with *South Dakota v. Dole*, 483 U.S. 203 (1987). But Congress did not do

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[17] The Court need not, and should not, address that situation here, because, as shown *supra*, Congress has left many sectors unregulated. Thus, the factual predicate is not present in this case while other pending cases may require resolution of that hypothetical issue.

[18] Respondents and several other *amici* resolve this dilemma by calling for a revival of substantive protection of States.

that here. *See* Pet. App. 20a n.6. Alternatively, Congress could have preempted the field, taking over the entire process of licensing drivers and registering motor vehicles. *New York*, 505 U.S. at 167. But it did not do so here. Congress could have enacted a generally applicable law of personal information regulation that applied only incidentally to States and State records. *Printz*, 521 U.S. at 932; *New York*, 505 U.S. at 160. In framing such a general law, however, Congress would have to act more consistently than its current *ad hoc* regulation. Thus, to the extent Congress perceives some legitimate need to regulate the dissemination of names and residential addresses, Congress has the tools to do so. Those tools, however, protect State autonomy.

The United States suggests that the "court of appeals' rule is also difficult to square with this Court's preemption jurisprudence." Pet. Br. at 38. Congress did not, however, preempt the field in this case. The *amici* States do not contend that the Tenth Amendment bars congressional enactment of a national system of licensing and registration. Congress could even go so far as to occupy that entire field. The Supremacy Clause would then result in preemption of State laws. Instead, Congress purported to leave licensing and registration to States while telling States how to do so.

There are two problems with the United States' effort to characterize this case as one about routine preemption. Normal preemption does not require an express directive to States. There is a fundamental difference between requiring State judges to adhere to the Supremacy Clause and instructing State legislatures that they may not legislate (or commanding State executives that they must, or must not, act). *See Printz*, 521 U.S. at 928-29. Because valid federal law will be enforced by the judiciary without the need for statutory directives, the congressional command directed to the State legislature or executive is of no (or very little) legal effect. Consequently, few States would bother to challenge mere surplusage of language. The fact that States may not find it an effective use of resources to challenge federal legislation that has little practical impact, however, does not provide a basis for assuming that the States have no legal basis for such a

challenge when an egregious case arises. *Cf. Printz*, 521 U.S. at 906, 910-11, 917 (voluntary State cooperation is allowed). Thus, when federal legislation contains language directed to State legislatures and executives, it may reflect the imposition of a unique and heavy burden and States may appropriately challenge such facial targeting.

Moreover, only federal laws "made in pursuance" of the Constitution are the "supreme law of the land." U.S. Const. art. VI. Thus, the preemption approach itself raises the threshold issue of whether the DPPA violates the Constitution; it is not a basis for ignoring the serious flaws in the DPPA. *Alden v. Maine*, 119 S. Ct. 2240, 2255 (1999) (citing *Printz*, 521 U.S. at 924-25). The United States' argument to the contrary simply employs circular reasoning.

CONCLUSION

The Court should affirm the judgment.

Respectfully submitted,

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ADDENDUM

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

FEDERAL TRADE COMMISSION, Plaintiff, v. TRW INC., Defendant.	Civil No. 3-91-CV2661-H

AGREED ORDER AMENDING CONSENT ORDER

The parties by their respective counsel having agreed to this Order amending the Consent Order entered in this matter on December 10, 1991, the Court finds that the Consent Order should be amended as moved by the parties.

It is hereby ORDERED that the Consent Order entered on December 10, 1991, is amended by striking Section XI and adding the following language as new paragraph 10 in Section II:

> Within one hundred and eighty (180) days of the date of this Amended Order, in the sale or distribution of lists of Consumers, but excluding those lists of Consumers developed through Prescreening, use only the following identifying information from its consumer reporting database to create such lists: name, telephone number, mother's maiden name, address, zip

code, year of birth, age, any generational designation, social security number, or substantially similar identifiers, or any combination thereof. If the FCRA is amended (or other similar legislation enacted), or the FTC issues any interpretation of the FCRA relating to any obligation imposed on TRW under this Section, TRW may conform the manner in which it conducts its business in the sale or distribution of lists to the requirements of such new statutory provision or interpretation; provided however that TRW shall notify the ADDCP promptly if it intends to change its conduct as provided for in this Section, and provided further that nothing in this provision shall limit the right of the FTC to challenge TRW's actions hereunder and to seek enforcement of TRW's obligations under this Amended Order.

ENTERED: this 14 day of January, 1993.

/s/ _____
BAREFOOT SANDERS
UNITED STATES DISTRICT
JUDGE

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No. 98-1464

IN THE
Supreme Court of the United States

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, *et al.*,
Petitioners,
v.
CHARLIE CONDON, ATTORNEY GENERAL OF THE STATE OF SOUTH CAROLINA, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, COUNCIL OF STATE GOVERNMENTS, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether the Driver's Privacy Protection Act of 1994, 18 U.S.C. §§ 2721-2725, violates the Tenth Amendment.

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal governments and officials throughout the United States. They have a compelling interest in the issue presented in this case: whether Congress may command the States and their departments of motor vehicles to adopt and administer the federal regulatory program created by the Driver's Privacy Protection Act ("DPPA"), 18 U.S.C. §§ 2721-2725.

This case is of vital importance to *amici* not only because it concerns the States' longstanding responsibility in operating their own state departments of motor vehicles, but also—and more fundamentally—because it strikes at the very heart of the States' political autonomy and ability to have a *choice* whether to adopt a federal regulatory program. *Amici* likewise have a substantial interest in ensuring that the lines of political accountability are not blurred by Congress to the detriment of the States. *Amici* therefore submit this brief to assist the Court in the resolution of this case.[1]

SUMMARY OF ARGUMENT

The United States stakes its case on a single, central assertion: It contends that the *sole* purpose of the Tenth Amendment is prohibiting the federal government from requiring the States "to regulate

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[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief *amicus curiae*. Their letters of consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party has authored this brief in whole or in part, and no person or entity, other than *amici*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

the primary activities of private parties or to participate in the enforcement of federal law against private actors." U.S. Br. 27. In the constitutional scheme hypothesized by the United States, all other considerations—for example, whether the federal statute singles out the States for special and unique burdens—are beside the point. Moreover, the United States' theory is based on an unsustainably cramped reading of *New York* v. *United States*, 505 U.S. 144 (1992), and *Printz* v. *United States*, 521 U.S. 898 (1997).

In our view, the United States' approach is fundamentally flawed. *First*, the United States' argument should fail even if its constitutional construct is accepted. The United States premises its argument on the basic assumption that the DPPA "impose[s] no affirmative obligations on the States to implement federal law." U.S. Br. 28. But that simply is not so: the DPPA in fact directs in unambiguously mandatory terms that state officials "shall" take affirmative steps to release specified information in aid of the federal programmatic regime. 18 U.S.C. § 2721(b). This is precisely the sort of statutory prescription that, the Court explained in *New York*, "clearly 'commandeer[s] the legislative processes of the States.'" 505 U.S. at 170 (citation omitted).

Second, and more fundamentally, the United States' underlying constitutional analysis is itself insupportable. Notably, the United States' brief fails to address the basic constitutional purposes and principles that underlie the Tenth Amendment. As the Court has explained, these principles ensure both that States "remain independent and autonomous within their proper sphere of authority" (*Printz*, 521 U.S. at 928), and that the state and federal governments govern along "distinct and discernable lines of politi-

cal accountability." *United States* v. *Lopez*, 514 U.S. 549, 576 (1995) (Kennedy, J., concurring). The DPPA runs afoul of both of these principles, and it accordingly may not stand.

ARGUMENT

I. THE TENTH AMENDMENT PROHIBITS THE FEDERAL GOVERNMENT FROM COMPELLING STATES TO ENACT OR ADMINISTER A FEDERAL REGULATORY PROGRAM

1. It is common ground between the parties to this case that "[t]he Constitution * * * 'leaves the several States a residuary and inviolable sovereignty,' THE FEDERALIST No. 39, p. 245 (C. Rossiter ed. 1961), reserved explicitly to the States by the Tenth Amendment." *New York*, 505 U.S. at 188. In identifying the nature of this area of state sovereignty, the Court recognized in its two recent Tenth Amendment decisions, *New York* and *Printz*, that "the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States." *Id.* at 166. Indeed, as the Court has long recognized:

> Both the States and the United States existed before the Constitution. The people, through that instrument, established a more perfect union by substituting a national government, acting, with ample power, *directly upon the citizens*, instead of the Confederate government, which acted with powers, greatly restricted, only upon the States.

Lane County v. *Oregon*, 74 U.S. (7 Wall.) 71, 76 (1868) (emphasis added). See also 2 J. Elliot, DEBATES ON THE FEDERAL CONSTITUTION 197 (2d ed. 1863) ("This Constitution does not attempt to coerce sovereign bodies, states, in their political capacity. * * * But this legal coercion singles out the * * * individual.") (Oliver Ellsworth); 4 *id.* at 456 ("the

necessity of having a government which should at once operate upon the people, and not upon the states, was conceived to be indispensable by every delegation present") (Charles Pinckney).

Principles of federalism embodied in the Tenth Amendment thus forbid the Federal Government from "commandeering" or compelling state governments or officials to effectuate the federal government's policies. While the federal government may encourage States to enact or administer a federal regulatory program, "[t]he Federal Government *may not* compel the States" to do so. *New York*, 505 U.S. at 188; *Printz*, 521 U.S. at 963 (emphasis added). The Constitution in this respect states a rule that prevents transformation of States into subordinate arms of the Federal Government and "thus contemplates that a State's government will represent and remain accountable to its own citizens." *Printz*, 521 U.S. at 920.

In *New York*, the Court applied this principle to hold unconstitutional a federal law that compelled States to provide for the disposal of radioactive waste generated within their borders. 505 U.S. at 177. In considering the federal statute's provision allowing States the "choice" between "accepting ownership of waste or regulating according to the instructions of Congress," the Court found that the provision violated the Tenth Amendment because it left the States no real choice at all: "No matter which path the State chooses, it must follow the direction of Congress." *Id.*

On the one hand, the States could accept "the option of taking title to and possession of the low level radioactive waste generated within their borders and becoming liable for all damages waste generators suffer as a result of the States' failure to do so

promptly." *Id.* at 174-175. But, standing alone, this option would be impermissible because the Court would not allow Congress to simply transfer radioactive waste to the States or direct the States to assume damages liability. This would " 'commandeer' state governments into the service of federal regulatory purposes." *Id.* at 175.

On the other hand, the other option left open to the States—"regulating pursuant to Congress's direction"—was "a simple command to state governments to implement legislation enacted by Congress." *Id.* at 175-176. This also would amount to a commandeering of the state legislature, which the Court regarded as plainly prohibited by the Tenth Amendment. See *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288 (1981) (Congress may not "commandeer[] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program").

Thus, the Court held that the federal provision was unconstitutional because "[a] choice between two unconstitutionally coercive regulatory techniques is no choice at all." 505 U.S. at 176. "Either way, 'the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.' " *Ibid.* (quoting *Hodel*, 452 U.S. at 288).

Likewise, in *Printz* the Court held that the Brady Act violated the Tenth Amendment because the Act commanded state executive officials—"without the consent of the States"—to participate in background checks of purchasers of handguns. 521 U.S. at 911. For handgun purchases made without a state permit and state background check, the Act required the "chief law enforcement officer" (CLEO) of the jurisdiction to "make a reasonable effort to ascertain

within 5 business days whether receipt or possession would be in violation of the law, including research in whatever State and local record keeping systems are available and in a national system designated by the Attorney General." *Id.* at 903 (internal quotations omitted). However, the Brady Act did "not require the CLEO to take any particular action if he determine[d] that a pending transaction would be unlawful; he may notify the firearms dealer to that effect, but [was] not required to do so." *Ibid.* If the CLEO found no basis for objecting to the sale, the Act required the CLEO to destroy the records relating to the purchase. *Id.* at 904.

In considering these provisions, this Court found that the Act "direct[ed] state law enforcement officers to participate, albeit only temporarily, in the administration of a federally enacted regulatory scheme." *Ibid.* Such "forced participation of the States' executive in the actual administration of a federal program" (*id.* at 918) violated the Tenth Amendment's "anti-commandeering" prohibition. *Id.* at 935. As the Court put it: "The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program." *Ibid.*

2. As both *New York* and *Printz* recognize, these federalism principles protect two fundamental features of our republican form of government: state autonomy and political accountability. Of course, "[i]t is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority." *Printz*, 521 U.S. at 928. By guaranteeing States a choice whether to enact or administer a federal program,

the Tenth Amendment preserves a sphere of political autonomy for States that is vital to the notion of a dual sovereign system. Indeed, "[t]his separation of the two spheres is one of the Constitution's structural protections of liberty." *Printz*, 521 U.S. at 921. As the Court explained recently in *Alden* v. *Maine*: "The States 'form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere.'" 119 S. Ct. 2240, 2247 (1999) (quoting THE FEDERALIST No. 39 (C. Rossiter ed. 1961) (J. Madison)).[2]

At the same time, by preserving separate spheres of political autonomy for the federal and state governments, the Tenth Amendment furthers the ideal of political accountability that is central to the Framers' concept of democracy. Cf. *Alden*, 119 S. Ct. at 2265 ("When the Federal Government asserts authority over a State's most fundamental political processes, it strikes at the heart of the political accountability so essential to our liberty and republi-

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[2] See *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring) (the Framers established "two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it"); *Duncan* v. *McCall*, 139 U.S. 449, 461 (1891) (the "distinguishing feature" of a dual sovereign system is "the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies"); THE FEDERALIST No. 20 (C. Rossiter ed. 1961) ("a sovereignty over sovereigns, a government over governments * * * as contradistinguished from individuals, as it is a solecism in theory, so in practice it is subversive of the order and ends of civil polity") (A. Hamilton and J. Madison); Deborah Jones Merritt, "Three Faces of Federalism: Finding a Formula for the Future," 47 VAND. L. REV. 1563, 1573-1584 (1994).

can form of government."). To hold their elected officials accountable, the voters must be able to know whether a particular law or regulation is the handiwork of their state or federal officials.

To that end, the "anti-commandeering" principle ensures that, when Congress seeks to effectuate a policy, "it is the Federal Government that makes the decision *in full view of the public*," so that it will "suffer the consequences if the decision turns out to be detrimental or unpopular." *New York*, 505 U.S. at 168 (emphasis added). Thus, "[w]here Congress encourages state regulation rather than compelling it, state governments remain responsive to the local electorate's preferences; state officials remain accountable to the people." *Ibid.* In contrast, when the federal government compels States to enact or administer a federal program, the lines of political accountability are necessarily blurred. In essence, the two spheres of political autonomy between federal and state governments are merged, thereby leaving the public without "distinct and discernable lines of political accountability." *Lopez*, 514 U.S. at 576 (Kennedy, J., concurring). State officials may be unjustly forced to "bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision." *New York*, 505 U.S. at 169. Similarly, "[m]embers of Congress can take credit for 'solving' problems without having to ask their constituents to pay for the solutions with higher federal taxes." *Printz*, 521 U.S. at 930. "Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation." *New York*, 505 U.S. at 169.

In the end, a rule that permits the Federal Government to intrude excessively into the area of state autonomy would do considerable damage to our dual system of governance. As Justice Kennedy explained in *Lopez:*

> The theory that two governments accord more liberty than one requires for its realization two distinct and discernable lines of political accountability: one between the citizens and the Federal Government; the second between the citizens and the States. If, as Madison expected, the Federal and State Governments are to control each other, see THE FEDERALIST No. 51, and hold each other in check by competing for the affections of the people, see THE FEDERALIST No. 46, those citizens must have some means of knowing which of the two governments to hold accountable for the failure to perform a given function. "Federalism serves to assign political responsibility, not to obscure it." Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory.

514 U.S. at 576-577 (other citations omitted).

"The resultant inability to hold either branch of the government answerable to the citizens," Justice Kennedy concluded, "is more dangerous even than devolving too much authority to the remote central power." *Id.* at 577. This danger is particularly grave in today's political environment, in which voters have become increasingly distrustful of their elected offi-

cials—thus making the need for transparency in government action more urgent than ever.

3. In arguing against the applicability of *New York* and *Printz* in the setting of this case, the United States offers a single ground of distinction: it argues that these decisions come into play only when the federal law "require[s] state governments or officers to regulate the primary activities of private parties or to participate in the enforcement of federal law against private actors." U.S. Br. 27. In contrast, the United States continues, under *New York* and *Printz* the Tenth Amendment can have no application to federal laws that regulate the activities only of the States themselves. See *id.* at 27-29.

As we explain below, the United States would not prevail even under its own reading of *New York* and *Printz* because the DPPA does, in fact, "conscript state governments into federal service." U.S. Br. 28. More fundamentally, however, the United States' crabbed interpretation of these decisions is flawed. The decisions quite plainly do not make "required active state participation in the enforcement of federal law against private parties" (*ibid.*) the be-all and end-all of the Tenth Amendment.

Thus, in *New York*, the Court made clear that the challenged "take title" provision—which operated directly on the States—would be unconstitutional even if it were wholly divorced from any attempt to regulate the primary activities of private parties. The Court explained:

> Such a forced transfer, standing alone, would in principle be no different than a congressionally compelled subsidy from state governments to radioactive waste producers. The same is true

> of the provision requiring the States to become liable for the generator's damages. Standing alone, this provision would be indistinguishable from an Act of Congress directing the States to assume the liabilities of certain state residents. Either type of federal action would "commandeer" state governments into the service of federal regulatory purposes, and would for this reason be inconsistent with the Constitution's division of authority between federal and state governments.

New York, 505 U.S. at 175.

The Court therefore concluded that "an instruction to state governments to take title to waste, standing alone, would be beyond the authority of Congress." *Id.* at 176. The United States accordingly is wrong: It is the detrimental effect of a federal law on state autonomy—rather than the simple fact that the law does or does not use the States to regulate the conduct of third parties—that determines its constitutionality.

Indeed, there is a perverse quality to the United States' argument that the intrusion on state sovereignty is somehow greater when Congress uses the States to regulate private parties than when it directly regulates the States themselves. As the Court observed when rejecting a very similar contention by the United States in *Printz*, "we fail to see how that improves rather than worsens the intrusion into state sovereignty. * * * It is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority." *Printz*, 521 U.S. at 928.

II. THE DPPA VIOLATES THE TENTH AMENDMENT'S PROHIBITION AGAINST COMMANDEERING THE STATES TO ADOPT AND ADMINISTER A FEDERAL REGULATORY PROGRAM

1. Against this background, it would seem self-evident that the DPPA is inconsistent with fundamental constitutional principles. *First*, there is no doubt that the DPPA imposes mandatory obligations (and prohibitions) on the States. By prohibiting the States from having a "policy" that does not comply with the federal regulatory system (see 18 U.S.C. § 2723(b)), the DPPA effectively requires States to enact state laws that adopt the federal program. The only choice the States are given is to adopt the federal program or face a fine of $5,000 per day for noncompliance. But this is no real choice at all. Either way, States are given no opportunity to opt out of the federal program. See *Printz*, 521 U.S. at 904. Indeed, the United States does not contend otherwise.[3]

[3] In fact, many state legislatures have already taken steps to comply with the DPPA, thus confirming the DPPA's coercive nature. See CAL. VEH. CODE § 1808(e) (West 1999) ("[t]he department shall not make available or disclose personal information about any person unless the disclosure is in compliance with the Driver's Privacy Protection Act of 1994"); COLO. REV. STAT. ANN. § 42-1-206 note (West 1999) ("The general assembly hereby finds and declares that this act is mandated by the provisions of the federal 'Driver Privacy Protection Act of 1994' * * * and that the state may be subject to penalties if legislation to comply with the federal act is not enacted on or before September 13, 1997."); FLA. STAT. ANN. § 319.17 note ("such an exemption will conform state law to the requirements of the federal Driver's Privacy Protection Act of 1994"); IOWA CODE ANN. § 321.11 (West 1999) ("All records of the department, other than those made confidential or not permitted to be open in accordance with 18 U.S.C. § 2721 et seq. * * * shall be open to public inspection during office hours."); IND. CODE § 9-14-3.5-1 (West 1999) ("[t]his chapter implements the federal Driver's Privacy Protection Act of 1994"); ME. REV. STAT. ANN. § 256 ("The Secretary of State shall comply with the provisions of Title 18, United States Code, Chapter 123 in disclosing records."); MD. CODE ANN. STATE GOV'T § 10-616(7)(ii)(2) (Lexis 1998) ("[t]he regulations and procedures adopted under this subparagraph shall * * * conform with the waiver requirements in the federal Driver's Privacy Protection Act of 1994"); MINN. STAT. ANN. § 168.346(d) (West 1998) ("To the extent permitted by United States Code, title 18, section 2721, data on individuals provided to register a motor vehicle is public data on individuals and shall be disclosed as permitted by United States Code, title 18, section 272, clause (b)."); NEB. REV. STAT. § 60-2903 (West 1999) ("The Legislature hereby finds that the federal Driver's Privacy Protection Act of 1994, with an effective date of September 13, 1997, provides for mandatory release in some instances and restrictions on release and use in other instances of certain personal information from state motor vehicle records and also provides numerous exceptions from those restrictions. * * * the purpose of the Uniform Motor Vehicle Records Disclosure Act is to enact choices permitted under the federal legislation in the interest of ensuring that motor vehicle record information which is a matter of public record shall remain a matter of public record in this state to the maximum extent permitted under the federal law."); N.H. REV. STAT. ANN. § 260:14 (Lexis 1998); N.J. STAT. ANN. § 39:2-3.4d (West 1999) ("As provided by the federal 'Drivers' Privacy Protection Act,' * * * a person authorized to receive personal information under paragraphs (1) through (10) of subsection c. of this section may resell or redisclose the personal information only for a use permitted by paragraphs (1) through (10) of subsection c. of this section subject to regulation by the division."); N.Y. VEH. & TRAF. LAW § 313(h) (West 1999) ("information obtained by the department pursuant to this section shall not be disclosed * * * by the department * * * except in response

The DPPA thus stands in stark contrast to all the permissible means that Congress has at its disposal to encourage state action. For instance, in *Hodel* the Court upheld a federal statute (the Surface Mining

Act) against a Tenth Amendment challenge because the Act did not "compel[] [States] to enforce the [federal] standards, to expend any state funds, or to participate in the federal regulatory program in any manner whatsoever." 452 U.S. at 228. The Act gave the States the option of implement[ing] [the federal program] itself or else yield[ing] to a federally administered regulatory program." *Id.* at 289. Likewise, Congress may use its spending power to encourage state participation through the placement of certain conditions on state use of federal funds. See, *e.g.*, *New York*, 505 U.S. at 167; *South Dakota* v. *Dole*, 483 U.S. 203, 206 (1987). Of course, the

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to a specific, individual request for such information authorized pursuant to the federal driver's privacy protection act"); N.D. CENT. CODE § 39-02-05 note (Lexis 1999) ("This Act becomes ineffective on the date the attorney general certifies to the legislative council that the Federal Driver's Privacy Protection Act of 1994 * * * has been declared unconstitutional by the United States Supreme Court or is otherwise void."); OHIO REV. CODE. ANN. § 4501.27(E) (West 1999) ("The registrar of motor vehicles may adopt any forms and rules, consistent with but no more restrictive than the requirements of Public Law No. 130-322, Title XXX, 18 U.S.C. 2721-2725, that are necessary to carry out the registrar's duties under this section on and after September 13, 1997."); R.I. GEN. LAWS § 27-49-3.1(a) (Lexis 1998) ("The purpose of this section is to implement the federal driver's privacy protection act of 1994 ("DPPA"), 18 U.S.C. § 2721."); *id.* at note (the section "shall remain in effect so long as the DPPA remains effective"); TENN. CODE ANN. § 55-25-102 (1998) ("The purpose of this chapter is to implement the federal Drivers' Privacy Protection Act of 1994 ("DPPA") * * * in order to protect the interest of individuals in their personal privacy of prohibiting the disclosure and use of personal information contained in their motor vehicle records * * *."); TEXAS TRANS. CODE ANN. § 731.001 et seq. (West 1999); W. VA. CODE § 17A-2A-2 (Lexis 1998) ("The purpose of this article is to implement the federal Driver's Protection Act of 1994.").

essential ingredient in both situations is that the States ultimately have the ability to opt out of the federal program.

Here, that is not so. The obligations imposed on the States by the DPPA are unavoidable for so long as the statute remains on the books, leaving the States "no choice at all" but to follow the federal program. See *New York*, 505 U.S. at 176.

Second, the DPPA expressly imposes direct, *affirmative* obligations on the States. The United States describes the statute in modest terms, stating that it "permits," "authorizes," or "allows" the disclosure of information by DMVs in certain circumstances (U.S. Br. 7, 8), and 'simply forbid[s] DMVs from taking action (dissemination of information) that contravenes the substantive restrictions on disclosure put in place by the federal law to protect personal privacy." U.S. Br. 28. In a significant respect, however, this construction of the DPPA is far too modest. In fact, the statute provides that certain categories of information "shall be disclosed" by DMVs. 18 U.S.C. § 2721(b). There is no doubt that Congress meant this disclosure obligation to be mandatory and prescriptive, because Congress immediately contrasted these categories of information (which "shall" be disclosed) with other categories that "may be disclosed." *Ibid.*

The Court left no doubt in *New York* that such a federal statute, which requires States to affirmatively exercise governmental authority in aid of a federal regime, "clearly 'commandeer[s]' the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." 505 U.S. at 170 (citation omitted). As the Court expressly held in *New York*, such a statute is invalid

under the Tenth Amendment, and that holding is dispositive here.

Third, even if its imposition of express affirmative obligations on the States were not itself fatal to the DPPA, the statute would have to fail because it effectively incorporates the States into a federal regulatory regime. It thus violates the Tenth Amendment's prohibition against "forced participation of the States' executive in the actual administration of a federal program" (*Printz*, 521 U.S. at 918). Indeed, the entire regulatory scheme established by the DPPA is directed at, and predicated on, the requirement that state officials administer provisions of the DPPA.

In arguing to the contrary, the United States analogizes the DPPA to standard preemption. See U.S. Br. 38. But that is not the appropriate analogy. The DPPA does not displace state *laws* that regulate private behavior; it requires particular action (both affirmative and negative) by the *States* themselves.

Nor does the DPPA present a situation, like that considered in *FERC*, where Congress offered the States the option of regulating in the prescribed manner or withdrawing from regulation of a preemptible field. See *FERC* v. *Mississippi*, 456 U.S. 742, 765-766 (1982). See also *South Carolina* v. *Baker*, 485 U.S. 505, 514-515 (1988) ("that a State wishing to engage in certain activity must take administrative and sometime legislative action to comply with federal standards regulating that activity is a commonplace that presents no constitutional defect").

Given the ubiquity of the automobile in our society, it is essential to have a system of registration of drivers. See *Reitz* v. *Mealey*, 314 U.S. 33, 36 (1941) ("The universal practice is to register ownership of

automobiles and to license their drivers."), *overruled on other grounds*, *Perez* v. *Campbell*, 402 U.S. 637, 651-652 (1971). This important responsibility has long been entrusted to the States. See *United States* v. *Best*, 573 F.2d 1095, 1103 (9th Cir. 1978) ("there is little question that the licensing of drivers constitutes 'an integral portion of those governmental services which the States and their political subdivisions have traditionally afforded their citizens"); *Peel* v. *Florida Dep't of Transp.*, 600 F.2d 1070, 1083 (5th Cir. 1979) ("Overseeing the transportation system of the state has traditionally been one of the functions of state government, and thus appears to be within the activities protected by the tenth amendment.").

And as a practical matter, of course, it is impossible for the States to dissolve their DMVs and withdraw from the regulation of motor vehicle registration. This means that the DPPA effectively requires the States to create—and administer—programs for the release of driver information in accordance with the federal mandate. Cf. *South Carolina*, 485 U.S. at 511 (where statute "effectively requires" state action, for Tenth Amendment purposes, it is treated as if it directly mandated that action). As the United States puts it (Br. 8), "[t]he Act permits [State] DMVs to disclose personal information from motor vehicle records in circumstances in which Congress found that the public interest in disclosure for a particular use outweighs concerns about invasion of privacy."

The practical obligations imposed by the DPPA on state officers are manifest. After all, the DPPA does not establish a national department of motor vehicles to administer the federal program. Nor does

it provide federal employees or federal funding to administer the DPPA—including its labyrinthine set of "permissible use" provisions that authorize (and, in certain circumstances, require) disclosure of information contained in drivers' licenses. 18 U.S.C. §§ 2721(b)(1)-(14). That heavy burden is imposed squarely on the States.

Thus, on the front lines of the administration of the DPPA are state, not federal, officials. State officials will be the ones who receive the requests for information from the public, and they will be forced to make the judgment calls on numerous such requests regarding whether they fall within DPPA's general prohibition against disclosure (§ 2721(a)) or within some permissible use (§ 2721(b)). Because the DPPA mandates disclosure in some circumstances, state officials may not refuse to respond to the request. See *id.* § 2721(b).

It thus is readily apparent that the States have numerous *affirmative* obligations to administer the DPPA: *first*, to establish a policy or practice in "substantial compliance" with the Act, or be subject to a fine of $5,000 a day; *second*, to process requests for information and make a determination of permissible or non-permissible use according to the federal standards set by the DPPA; and *third*, to provide the necessary manpower, funding, and training to process all requests for information in accordance with the DPPA.

In this regard, the DPPA is even more coercive of state officials than the provisions of the Brady Act that the Court found unconstitutional. The Brady Act required state officials "to provide information that belongs to the State and is available to them only in their official capacity." 521 U.S. at 932 n.17.

Unlike the DPPA, however, the Brady Act required the state official only to make a "reasonable effort" in conducting the background check, and did "not require the [state official] to take any particular action if he determine[d] that a pending transaction would be unlawful." 521 U.S. at 903. The participation of the state officials in the federal program was forced, but it was only "temporary." *Id.* at 904.

Here, however, the participation of state officials is not only forced, it is permanent. The DPPA provides that state officials "shall not disclose" information in certain circumstances, "shall * * * disclose[]" such information in other circumstances, and "may * * * disclose[]" such information in still other circumstances. 18 U.S.C. § 2721(b). Unlike the Brady Act, there is nothing in the DPPA that gives state officials a safe harbor if they make "reasonable efforts" or if they simply are unable to process the request for information. This forced participation of state officials in the federal program established by the DPPA squarely violates the Tenth Amendment. See *Printz*, 521 U.S. at 933, 935.

2. In arguing that the Federal Government may impose obligations on the States, the United States relies almost exclusively on *South Carolina*, *supra*. See U.S. Br. 30-31, 37-38. But that reliance is fundamentally misplaced. *South Carolina*, of course, did not involve a statute that affirmatively directed the States to take particular governmental action (*i.e.*, providing that state officials "shall" take specified steps); as we have explained, the DPPA does. This requirement that state officials "participate * * * in the administration of a federally enacted regulatory scheme" (*Printz*, 521 U.S. at 904) makes all the difference.

There is another basic distinction between the cases: while *South Carolina* concerned a generally applicable statute that affected private parties (and, for that matter, the United States), as well as the States,[4] the DPPA is directed exclusively at the States. The United States argues at length that this distinction is immaterial. U.S. Br. 34-39. It is apparent, however, that federal laws that single out States enable the Federal Government effectively to eliminate the States as meaningful participants in the federal system and are of necessity constitutionally suspect.

The Supremacy Clause unquestionably gives valid federal laws primacy when they conflict with state enactments. See *Alden*, 119 S. Ct. at 2255. But if (as the United States maintains) the Federal Government may single out the States, and impose on them whatever affirmative obligations and negative prohibitions it wishes—so long as it does not require them to enact or administer laws that regulate private parties in particular ways, which the United States regards as the entirety of the holdings of *New York* and *Printz*—the States surely will not "remain independent and autonomous within their proper sphere of authority." *Printz*, 521 U.S. at 928. Because the United States offers no stopping point for its expansive theory, its approach offends "the

---

[4] See *South Carolina*, 485 U.S. at 510; see also *id.* at 526-527 ("Nor does § 310 discriminate against States. The provisions of § 310 seek to assure that *all* publicly offered long-term bonds are issued in registered form, whether issued by state or local governments, the Federal Government, or private corporations."). The Court has since characterized *South Carolina* as addressing "the authority of Congress to subject state government to generally applicable laws." *New York*, 505 U.S. at 160.

very principle of separate state sovereignty" (*id.* at 932), and should be dismissed out of hand.

3. Viewed against this background, the DPPA does considerable damage to the notions of state autonomy and political accountability. By forcing States to adopt and administer a federal regulatory program, the DPPA blurs the lines of accountability and leaves the public without a clear indication of the Federal Government's responsibility in enacting the DPPA.

This is no small matter to state governments. As written, the DPPA essentially is an open invitation for errors and incorrect disclosures of information. The Act provides not a single word of guidance or instruction on "the extent to which the state officer must investigate and confirm the accuracy of the claims made by individuals requesting the information." *Pryor* v. *Reno*, 171 F.3d 1281, 1286 (11th Cir. 1999). Disclosures of information may occur that turn out to have been made without verification, as appears to be permitted by DPPA. At the same time, it is easy to imagine that a non-disclosure or delayed disclosure of such information could result in adverse consequences if the need for the information is legitimate and pressing. Inevitably, any criticism by the public about the DPPA or its implementation will be directed at those government officials who are forced to administer it: state officials. Cf. *Printz*, 521 U.S. at 930 ("[the States] are put in the position of taking the blame for [the federal regulation's] burdensomeness and for its defects").

4. In the end, the United States falls back on the arguments that Congress acted with careful consideration to enact a measured and balanced program

(U.S. Br. 4-7, 20-23, 39-42), that Congress should not be denied the opportunity "to experiment in addressing regulatory concerns in complex fields such as this one" (*id.* at 42), that it might be awkward and difficult for Congress to have to legislate with due regard for state interests (*id.* at 43); and that the DPPA is supported by the Necessary and Proper Clause. *Id.* at 44. Surely, however, the Constitution gives the States the right to object to being made the servants of experiments in governance conducted by the Federal Government.

In any event, whether or not the DPPA is sensible legislation, the Court already has rejected arguments of precisely the sort advanced by the United States in this case. In *Printz*, the Court observed that the Necessary and Proper Clause is "the last, best hope of those who defend *ultra vires* Congressional action." 521 U.S. at 923. As the Court there explained, the United States' argument in *Printz*—and its parallel contention here—is tautological:

> When a 'La[w] * * * for carrying into Execution' the Commerce Clause violates the principle of state sovereignty reflected in the various constitutional provisions * * * mentioned earlier, * * * it is not a 'La[w] * * * proper for the carrying into execution [of] the Commerce Clause,' and is thus, in the words of The Federalist, 'merely [an] active usurpation' which 'deserve[s] to to be treated as such.'

Printz, 521 U.S. at 923-924 (quoting THE FEDERALIST No. 33, at 204 (A. Hamilton)).[5]

[5] The United States unpersuasively argues (Br. 45-48) that it is irrelevant whether a federal statute is one of general applicability: "If particular state activity in or affecting commerce may, consistent with the Constitution, be brought within the reach of a regulatory law of the United States when that law *is* generally applicable, then the power to address that particular state activity necessarily *does* lie within the powers 'delegated to the United States by the Constitution.'" U.S. Br. 45.

The Court, of course, regards the distinction between generally applicable laws and those directed exclusively at the States as relevant, carefully noting that its decisions upholding the exercise of federal authority over States did involve "generally applicable laws." *New York*, 505 U.S. at 160.

It is a commonplace in many areas of constitutional analysis that a law that is perfectly innocuous when generally applicable is subject to a wholly different analysis when it targets particular entities or individuals. See, *e.g.*, *Romer* v. *Evans*, 517 U.S. 620, 633 (1996) (state constitution violated Equal Protection Clause because it singled out one group for disqualification of protection); *Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenue*, 460 U.S. 575, 583 (1983) (state tax that singled out press violated First Amendment); *United States* v. *Brown*, 381 U.S. 437, 450 (1965) (federal statute that did "not set forth a generally applicable rule" but instead singled out members of the Communist Party for prohibition from labor union violated Bill of Attainder Clause); see also *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 838-839 (1995) ("Establishment Clause would not permit the use of public funds to support 'a specifically religious activity in an otherwise substantially secular setting'" but would permit "general state law benefits to all its citizens").

By the same token, that Congress finds legislation like the DPPA expedient is quite beside the point. While a balancing of state and federal interests might be relevant "if we were evaluating whether the incidental application to the States of a federal law of

general applicability excessively interfered with the functioning of state governments" (*Printz*, 521 U.S. at 932), "no comparative assessment of the various interests" is appropriate when a law such as the DPPA is at issue. *Ibid.* After all, "'[t]he question is not what power the Federal Government ought to have but what powers in fact have been given by the people.'" *New York*, 505 U.S. at 157. As the Court thus has observed, seemingly with this case in mind:

> The result may appear 'formalistic' in a given case to partisans of the measure at issue, because such measures are typically the product of the era's perceived necessity. But the Constitution protects us from our own best intentions: it divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day.

New York, 505 U.S. at 187.

III. THE REGULATION OF DISCLOSURES OF INFORMATION CONTAINED IN STATE DRIVERS' LICENSES AND MOTOR VEHICLE RECORDS IS A MATTER BEST ENTRUSTED TO THE STATES

One of the hallmarks of the federal system is that the States are expected to "perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear." *Lopez*, 514 U.S. at 581 (Kennedy, J., concurring) (citing *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U.S. 1, 49-50 (1973); *New State Ice Co.* v. *Liebmann*, 285 U.S. 261, 311 (1932) (Brandeis, J., dissenting)). Prior to enactment of the DPPA, that is precisely what the States were doing. Although

the Federal Government unquestionably has an important role in addressing societal problems, it may not do so in a way that simply commandeers the States or violates principles of federalism.

As we note above, the regulation of drivers—and the responsibility for regulating the disclosure of information contained in driver's license and motor vehicle records—has long been left to the States. The DPPA, however, stands as a notable federal incursion into the operation of state DMV's. In 1994, Congress enacted the DPPA to address two kinds of concerns: first, safety concerns about the disclosure of information that may end up facilitating criminal acts, such as the well-publicized case of actress Rebecca Shaeffer (who was murdered by a stalker who obtained her address through a private investigator, who in turn procured the information from the state DMV); and second, privacy concerns about the sale of information primarily to mass marketers. See 140 Cong. Rec. H2522 (daily ed. Apr. 20, 1994) (statement of Rep. Moran); 139 Cong. Rec. S14381-04, 1993 WL 433130 (1993) (statement of Sen. Boxer); see also Thomas H. Odom & Gregory S. Feder, "Challenging the Federal Driver's Privacy Protection Act," 53 U. MIAMI L. REV. 71, 88 (1998).

Reasonable people may disagree on whether the DPPA struck the right balance between access and privacy, however. Some individuals may prefer more information, not less. Before the DPPA was enacted, many States treated drivers' licenses as a matter of public record to which the people should have open access, at least in certain circumstances. See Odom & Feder, *supra*, at 98-99 ("the overwhelming majority [of States] historically have treated motor vehicle

records as public records[;] * * * a vast majority of States have long recognized the public good that flows from open records and open government").

For instance, in North Carolina, the information associated with an application for a driver's license was considered open to the public. See N.C. GEN. STAT. § 20-27 (West 1998). Despite this general policy of openness, North Carolina law prohibited the Division of Motor Vehicles from selling or furnishing selective listings (*i.e.*, by age, sex, etc.) in bulk for commercial purposes. See Opinion of the Attorney General to Mr. Zeb Hocutt, Driver License Section, Division of Motor Vehicles, 47 N.C.A.G. 59 (1977), 1977 WL 26196.

Likewise, Wisconsin has historically been governed by an open-records law. Wisconsin Satute § 19.35 provides that "except as otherwise provided by law, any requester has a right to inspect any record." WIS. STAT. § 19.35(1)(a) (West 1999). Wisconsin law, however, does not make this right of public access absolute: it exempts from public inspection "any record containing personally identifiable information that, if disclosed, would * * * endanger an individual's life or safety." WIS. STAT. § 19.35(1)(a)(2). Furthermore, prior to the DPPA, Wisconsin allowed individuals to "opt-out" of having the personal information they provided on a driver's license or vehicle registration form from being disclosed to the public in certain cases. See Odom & Feder, *supra*, at 106 (citing Analysis by the Legislative Reference Bureau, 1997 Assembly Bill 338). Anyone registering a car or applying for a driver's license could direct that his or her "personal identifiers" (*i.e.*, name, street address, post-office box number, and

nine-digit extended zip code) be kept confidential from anyone requesting the personal information of ten or more people. See *ibid.*

Other States, in contrast, have had in place tighter restrictions on the disclosure of information—some even more restrictive than those created by the DPPA. Alaska, for instance, has treated drivers' licenses as "confidential and private," and does not allow disclosure of such information except to government agencies or the driver. ALASKA STAT. § 28.15.151 (1998). Virginia, too, has treated information contained in drivers' licenses as "privileged records" and has allowed disclosure only in narrowly defined circumstances. VA. CODE ANN. § 46.2-208 (1999). Several States, such as Kansas, prohibited the release of driver's license information for commercial use even before DPPA was enacted. See KAN. STAT. ANN. § 74-2012(b) (West 1998); Kansas State Attorney General Op. No. 84-106.

Likewise, California has prohibited the disclosure of residential addresses from drivers' licenses, except to government agencies. See CAL. VEH. CODE § 1808.21(a) (West 1999). Furthermore, as a result of the Rebecca Schaeffer tragedy, California added a provision to protect a person from stalking and other threats by suppressing the registration or driver's license record of any person if the person requesting the suppression submits verification that he or she is the subject of stalking or other threats of death or great bodily injury. See CAL. VEH. CODE § 1808.21(d). The California Attorney General has concluded that the DPPA now requires disclosures of information that the state statute had not previously permitted. See 79 Op. Cal. Att'y. Gen. 76 (95-805), 1996

WL 343305 (1996) ("Existing California law is generally more restrictive than the new federal requirements concerning the release of addresses contained in motor vehicle records.").

What these state laws demonstrate is not that one particular approach is better than the rest, but instead that no single one may be the best—at least not for the entire nation. States have had different views on how best to balance the interests of driver privacy and open access to information for their own citizens. Not all States have struck this balance in the same way, but that is to be expected in a federal system. The United States has offered no reason to believe that the operation of usual mechanisms of federalism is somehow inappropriate in this setting—and it has failed to reconcile its approach with the Tenth Amendment principles announced by the Court. The DPPA accordingly should be held invalid.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,
Petitioners,

v.

CHARLIE CONDON, ATTORNEY GENERAL FOR THE STATE OF SOUTH CAROLINA, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF *AMICUS CURIAE* OF WASHINGTON LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

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39 pp

QUESTION PRESENTED

Whether the Driver's Privacy Protection Act of 1994, 18 U.S.C. §§ 2721–2725, contravenes constitutional principles of federalism.

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INTEREST OF *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a nonprofit public interest law and policy center based in Washington, D.C., with supporters in all 50 States. WLF regularly appears in legal proceedings before federal and state courts to defend and promote free enterprise and individual rights. WLF has appeared before this Court in cases involving federalism. *See, e.g.*, *Gregory* v. *Ashcroft*, 501 U.S. 452 (1991).

WLF believes that the attached brief will assist the Court in resolving this case by supplying relevant matter not already raised by any party. In particular, WLF's brief argues that the Court ought to adopt the doctrine of enumerated powers as its guiding principle when deciding federalism cases.[1]

SUMMARY OF ARGUMENT

Federalism is more than a speed bump on the road to national progress. It reflects a pattern of life that predates the American Revolution and a constitutional order deliberately adopted by the American people. This brief addresses a single question: What is the soundest constitutional basis for adjudicating cases that raise questions of federalism? We contend that the answer lies with the doctrine of enumerated powers.

The Founding generation regarded the doctrine of enumerated powers as the mainspring of federalism. Friends of the Constitution relied on the doctrine to assure the Nation that the proposed Constitution would not create a consolidated government. Precedent and scholarly commentary confirm that the doctrine of

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amici curiae*, contributed monetarily to the preparation and submission of this brief. The parties have consented to the filing of this brief, and letters indicating their consent have been filed with the Clerk of the Court.

enumerated powers has long been regarded as the guiding principle with which to understand federalism.

The doctrine of enumerated powers yields a coherent theory of judicial review for deciding federalism cases. Among other virtues, it makes sense of the text and structure of the Tenth Amendment, justifies the exercise of judicial review as a vindication of popular sovereignty, keeps the form of government close to what the Constitution prescribes, and constrains the exercise of power by government—including the exercise of judicial review. An approach grounded in reserved powers offers none of these advantages.

ARGUMENT

THIS COURT SHOULD ADOPT THE DOCTRINE OF ENUMERATED POWERS AS ITS GUIDING PRINCIPLE WHEN DECIDING FEDERALISM CASES

The question presented asks [w]hether the Driver's Privacy Protection Act of 1994, 18 U.S.C. §§ 2721–2725, contravenes constitutional principles of federalism." "[F]airly included," SUP. CT. R. 14.1(a), is a further question. On what basis should the Court decide cases where a federal law or regulation is drawn in question on the ground that it violates "constitutional principles of federalism"? We contend that the answer lies with the doctrine of enumerated powers. This doctrine holds that the federal government "can exercise only the powers granted to it," *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 404 (1819), by the written Constitution according to "a fair construction of the whole instrument." *Id.* at 406.

Before launching into our argument, however, we reluctantly acknowledge an obvious fact. The doctrine of enumerated powers needs to be revived. Collective forgetfulness, *see* Martin Diamond, *The Forgotten Doctrine of Enumerated Powers*, 6 PUBLIUS 187, 187 (Fall

1976), has reduced it to all but an historical curiosity. "[I]n this day and age, discussing the doctrine of enumerated powers is like discussing the redemption of Imperial Chinese bonds." Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1236 (1994). Only recently has the Court breathed new life into it. *See United States* v. *Lopez*, 514 U.S. 549 (1995); *City of Boerne* v. *Flores*, 521 U.S. 507 (1997). This nascent (and welcome) change opens the door to restoring the doctrine of enumerated powers to the center of constitutional interpretation.

Federalism finds its classic expression in the Tenth Amendment, which confirms that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." U.S. CONST. amend. X. These words plainly say that neither the federal government nor the states possess all the powers of government. But by speaking both of "powers . . . delegated" and "powers . . . reserved," *id.*, the amendment invites alternative readings and a question.

One may test whether a federal law offends the Tenth Amendment by asking whether it is authorized by a power delegated to the federal government. *See New York* v. *United States*, 505 U.S. 144, 155 (1992). Or one may ask whether a federal law "invades the province of state sovereignty reserved by the Tenth Amendment." *Id.* Which approach is correct? When invited to choose, the Court saw no real difference between them.

> [J]ust as a cup may be half empty or half full, it makes no difference whether one views the question . . . as one of ascertaining the limits of the power delegated to the Federal Government under the affirmative provisions of the Constitution or one of discerning the core of sovereignty retained by the States under the Tenth Amendment.

Id. at 159. We respectfully disagree. Constitutional text, evidence of original understanding, precedent, and commentary agree that the doctrine of enumerated powers furnishes the soundest basis for deciding federalism cases. We begin by discussing the original understanding of the doctrine of enumerated powers and its relation to federalism.

A. The Founding Generation Regarded the Doctrine of Enumerated Powers as the Mainspring of Federalism

1. *The doctrine of enumerated powers stems from America's rejection of Blackstone's theory of absolute parliamentary sovereignty*

The doctrine of enumerated powers grew out of America's impassioned rejection of the British theory of sovereignty. Blackstone, "the preeminent authority on English law for the founding generation," *Alden* v. *Maine*, 119 S Ct. 2240, 2248 (1999), declared that "the power of parliament is absolute and without control." 1 WILLIAM BLACKSTONE, COMMENTARIES *157.

> It hath sovereign and uncontrollable authority in making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, . . . this being the place where that absolute despotic power, which must in all governments reside somewhere, is entrusted by the constitution of these kingdoms. . . . It can change and create afresh even the constitution of the kingdom and of parliaments themselves . . . . It can, in short, do every thing that is not naturally impossible . . . .

Id. at *156.

Blackstone's description of British sovereignty strikes today's reader as nothing short of tyrannical. Yet it was regarded at the time as a noble achievement,

eked out of "the great struggle . . . of the common law against the king," F.W. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 271 (H.A.L. Fisher ed., 1908). Freedom-loving Englishmen fought a Civil War, beheaded a king, and waged a Glorious Revolution—all to settle the point that the king is subject to law. *See* PAULINE MAIER, AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE 22 (1997) (Maier).

However, unlimited government, even unlimited representative government, was alien to traditional patterns of American life. "From the beginning of settlement, circumstances in America had run directly counter to the exercise of unlimited and undivided sovereignty." BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 202–03 (1967). Parliament governed the postal service, naturalization, navigation, and trade. *See id.* at 203. Its power "touched only the outer fringes of colonial life," while local colonial authority penetrated "most of the substance of everyday life." *Id.*; *see also* Andrew C. McLaughlin, *The Background of American Federalism*, 12 AM. POL. SCI. REV. 215, 216–18 (1918) (comparing the powers exercised by the British government with those exercised by colonial American governments in 1760).

Britain's theory of sovereignty and America's tradition of local self-government were thus bound to clash. In 1766, Parliament declared that it "had, hath, and of right ought to have, full power and authority to make laws and statutes of sufficient force and vitality to bind the colonies and people of America . . . in all cases whatsoever." Declaratory Act, 1766, 6 Geo. 3, ch. 12, *reprinted in* SOURCES OF ENGLISH CONSTITUTIONAL HISTORY 659–60 (Carl Stephenson & Frederick George Marcham eds. & trans., 1937). For eight years this declaration of unlimited authority remained a paper tiger. But in 1774 Parliament relied on the Declaratory Act to humble recalcitrant Massachusetts by replacing her colonial charter with a new form of government.

See Act for Better Regulating the Government of Massachusetts Bay (Massachusetts Government Act), 1774, 14 Geo. 3, c. 45. "This attempt presented the issue of parliamentary authority over the colonies in the plainest terms. The act unified Massachusetts behind the Boston insurgents, and it rallied the other colonies behind Massachusetts. It led directly to the First Continental Congress and the Revolution." 1 R.R. PALMER, THE AGE OF THE DEMOCRATIC REVOLUTION 175 (1959) (Palmer); *see also* 1 DAVID RAMSAY, THE HISTORY OF THE AMERICAN REVOLUTION 98-101 (Lester H. Cohen ed., 1990) (1789) (relating the colonists' alarm at the passage of the Massachusetts Government Act).

Once America declared her independence from Britain, and with it her right "to institute new government," THE DECLARATION OF INDEPENDENCE, *reprinted in* Maier, at 236, the states joined together under the Articles of Confederation. *See* DONALD S. LUTZ, THE ORIGINS OF AMERICAN CONSTITUTIONALISM 132 (1988). The Articles represented a complete repudiation of the Blackstonian theory of unitary and unlimited legislative sovereignty. Contrary to that theory the Articles spell out—they enumerate—the powers granted by the states to the Continental Congress. For example, Article IX begins with the words, "The united states in congress assembled, shall have the sole and exclusive right and power," followed by a description of the powers thereby granted. THE ARTICLES OF CONFEDERATION, *reprinted in* COLONIAL ORIGINS OF THE AMERICAN CONSTITUTION 380 (Donald S. Lutz ed., 1998). Succeeding paragraphs in Article IX adhere to the same pattern. *See id.* at 380–83. And if the circumscribed nature of congress's powers were still unclear, the penultimate paragraph of Article IX removes all doubt by imposing specific prohibitions on that power. *Id.* at 383.

For purposes of understanding the connection between the doctrine of enumerated powers and federalism, however, the most striking limitation on

power of the Continental Congress lies in Article II. It provides, "Each state retains its sovereignty, freedom, and independence, and every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled." *Id.* at 377. Aside from assuring the states' continuing "sovereignty, freedom, and independence," Article II marks the line dividing the authority of the Continental Congress from the authority of the states at the point where "Power, Jurisdiction and right" is "expressly delegated to the United States." *Id.* In short, article II makes it clear that the congress possessed only the power "expressly delegated" and that the states "retain[ed]" everything else. *Id.*

2. *Federalists fighting to ratify the Constitution relied on the doctrine of enumerated powers to assure the Nation that the Constitution did not create a consolidated government*

Eventually the Articles had to be replaced. Four pivotal moments during the proceedings of the Constitutional Convention gave the new federal system its central features. First, the Convention spurned the broad delegation of legislative powers contained in the Virginia Plan. Article 6 of the Plan proposed the creation of a national legislature with the power "to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation." 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 21 (Max Farrand ed., 1966) (Farrand). Article 6 was tacitly rejected when the committee of detail returned from its deliberations with a report containing a lengthy and precise enumeration of legislative powers. *See* 2 Farrand, at 181–83. That about-face is reflected in the detailed enumeration of

congressional powers composing Article I, § 8. *See* U.S. CONST. art. I, § 8.

Second, the Convention rejected the Virginia Plan's total reliance on proportional representation in Congress. Article 2 of the Plan proposed that "the rights of suffrage in the National Legislature ought to be proportioned to the Quotas of contribution, or to the number of free inhabitants, as the one or the other rule may seem best in different cases." 1 Farrand, at 20. Tortuous debates over the disproportionate role that Article 2 would give the large states in Congress spanned five weeks, *see, e.g., id.* at 35–38, 176–80, 196–202, 437–38, 444–50, 461–68, and brought the Convention to "a full stop." *Id.* at 511. Finally, the Convention formed a grand committee, which broke the deadlock. It proposed that representation in the House of Representatives follow the population of each state, while in the Senate "each State shall have an equal Vote." *Id.* at 524 (footnote omitted). Article I bears the imprint of that compromise. *See* U.S. CONST. art. I, § 2 (declaring that representation in the House of Representatives is proportional to each state's population); *id.* at § 3 (declaring that each state has equal representation in the Senate).

Third, the Convention rejected the Virginia Plan's proposal, which would have given Congress authority "to negative all laws passed by the several States, contravening in the opinion of the national Legislature the articles of Union." 1 Farrand, at 21. In place of James Madison's beloved negative on state laws the Convention adopted the principle of federal supremacy. *See* 2 Farrand, at 28–29. Because of that decision, conflicts between state and federal law are settled according to the rule that "[t]his Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land." U.S. CONST. art. VI.

Fourth, the Convention replaced the mode of ratification prescribed by the Continental Congress with one of its own devising. According to the resolution that authorized the Philadelphia Convention, any revisions to the Articles of Confederation would be valid only after "agreed to in congress and confirmed by the states." 3 Farrand, at 14. Madison argued that the mode of ratification ought to be changed. He reasoned that sending the Constitution to state legislatures for ratification would form a "league or treaty," while ratifying it in special conventions elected for that single purpose would form a "Constitution." 2 Farrand, at 93. From this difference in the mode of ratification Madison discerned a profound difference in the legal effect of a law enacted contrary to the terms of the document. If the Constitution were ratified by state legislatures, thereby forming a league of states, a law violating the document "might be respected by the Judges as a law, though an unwise or perfidious one." *Id.* In contrast, a law violating a constitution ratified by the people in special conventions "would be considered by the Judges as null & void." *Id.* With these arguments still ringing in their ears, the Convention turned back a "motion to refer the plan to the Legislatures of the States," deciding instead to submit the Constitution to "assemblies chosen by the people." *Id.*

During ratification, the Antifederalists' central charge against the proposed Constitution was that it would erect a consolidated government. By this they meant two things. *See* JACK N. RAKOVE, ORIGINAL MEANINGS 181 (1996) (Rakove). First, the Antifederalists pointed out that the Constitution exchanged the confederal form of government established by the Articles of Confederation for a government that would act on citizens directly. Along this line, the author of the Federal Farmer letters wrote, "The plan of government now proposed is evidently calculated totally to change, in time, our condition as a people. Instead of

being thirteen republics, under a federal head, it is clearly designed to make us one consolidated government." Federal Farmer No. 1, Oct. 8, 1787, *reprinted in* 1 THE DEBATE ON THE CONSTITUTION 248 (Bernard Bailyn ed., 1993) (Debate). Antifederalists also used the word "consolidated" to denote the more sinister possibility that the new national government would eventually devour state sovereignty. Addressing the North Carolina Ratifying Convention, Samuel Spencer said, "It appears to me that the state governments are not sufficiently secured, and that they may be swallowed up by the great mass of powers given to Congress." Samuel Spencer in North Carolina Ratifying Convention, July 25, 1788, reprinted in 2 Debate, at 854. Robert Whitehill, who led the opposition to ratification in Pennsylvania, declared "with encreasing confidence . . . that the proposed constitution must eventually annihilate the independent sovereignty of the several states." Robert Whitehill in Pennsylvania Ratifying Convention, Nov. 30, 1787, *reprinted in id.* at 811. And the author of the *Brutus* letters struck the same note of alarm. "[A]lthough the government reported by the convention does not go to a perfect and entire consolidation, yet it approaches so near to it, that it must, if executed, certainly and infallibly terminate in it." Brutus No. 1, *New York Journal* (Oct. 18, 1787), *reprinted in id.* at 165–66.

The Federalists responded with a battery of defenses. In *Federalist* 39 James Madison offered a careful description of the federal system designed by the Constitution. He wrote, "The proposed Constitution . . . is in strictness neither a national nor a federal constitution; but a composition of both." THE FEDERALIST NO. 39, at 257 (Jacob E. Cooke ed., 1961) (James Madison) (Federalist). Madison explained that the mode of ratification marked the document as federal, since ratification would be "given by the people, not as individuals composing one entire nation; but as

composing the distinct and independent states to which they respectively belong." *Id.* at 254. The mode of amendment struck him as incorporating both national and federal elements. National because it allows less than a unanimous vote to amend the Constitution, *see id.* at 257, federal because it requires more than a majority and calculates the proportion by the number of states rather than the number of citizens. *See id.* Madison assessed Congress and the Executive, classifying each as mixture of federal and national elements. *Id.* at 254–55. He then probed the operation of the federal government and the scope of its powers. Madison regarded the operation of government as a sign that it was national, since it operated on citizens rather than states. The scope of government he considered federal, because "its jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects." *Id.* at 256.

With Madison's careful description of the federal system in view, it was now possible to confront the charge of consolidation head-on. "It was left to James Wilson in the Pennsylvania Ratifying Convention to deal most effectively with the Antifederalist conception of sovereignty. More boldly and more fully than anyone else, Wilson developed the argument that would eventually become the basis of all Federalist thinking." GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 530 (1969) (Wood). Wilson began his argument by returning to the premise that underlay Blackstone's theory of sovereignty. "There necessarily exists in every government a power, from which there is no appeal; and which, for that reason, may be termed supreme, absolute, and uncontrollable. Where does this power reside?" James Wilson, Speech at the Pennsylvania Ratifying Convention (Nov. 26, 1787), *reprinted in* 2 JAMES WILSON, THE WORKS OF JAMES WILSON 770

(Robert Green McCloskey ed., 1967). Wilson's answer dramatically changed American constitutional thought.

> Perhaps some politician, who has not considered, with sufficient accuracy, our political systems, would answer, that, in our governments, the supreme power was vested in the constitutions. . . . The truth is, that, in our governments, the supreme, absolute, and uncontrollable power remains in the people. As our constitutions are superiour to our legislatures; so the people are superiour to our constitutions.

Id. Speaking of the federal Constitution, Wilson said, "In this constitution, all authority is derived from THE PEOPLE." *Id.* at 772.

By locating sovereignty in the people rather than in the states, Wilson "seemed to make sense of the entire system." Wood, at 532. He could now reply with force to the Antifederalist charge of consolidation. "It is objected to this system, that under it there is no sovereignty left in the state governments. . . . I should be very glad to know at what period the state governments became possessed of the supreme power." James Wilson, Pennsylvania Ratifying Convention, Dec. 11, 1787, *reprinted in* 1 Debate, at 840. Adding to his earlier insight, Wilson argued, "The power both of the general government, and the state governments, under this system, are acknowledged to be so many emanations of power from the people." *Id.* at 840–41.

> If they chuse to indulge a part of their sovereign power to be exercised by the state governments, they may. If they have done it, the states were right in exercising it; but if they think it no longer safe or convenient, they will resume it, or make a new distribution, more likely to be productive of that good, which ought to be our constant aim.

Id. at 840; *see also* Federalist No. 46, at 315 ("The Fœderal and State Governments are in fact but different

agents and trustees of the people, instituted with different powers, and designated for different purposes.").

Locating sovereignty in the people enabled the Federalists to understand and defend federalism, "where, contrary to the prevailing thought of the eighteenth century, both the state and federal legislatures were equally representative of the people at the same time . . . ." Wood, at 545–46. "Only a proper understanding of this vital principle of the sovereignty of the people could make federalism intelligible." *Id.* at 600. Indeed, Wilson's theory of popular sovereignty revealed American federalism to be "a new kind of federal structure unknown in Europe." 1 R.R. PALMER, THE AGE OF THE DEMOCRATIC REVOLUTION 228 (1959). "The new idea was that, instead of the central government drawing its powers from the states, both central and state governments should draw their powers from the same source; the question was the limit between these two sets of derived powers." *Id.*

Once again, Wilson furnished the answer by first articulating the relationship between enumerated and reserved powers.

> When the people established the powers of legislation under their separate governments, they invested their representatives with ever right and authority which they did not in explicit terms reserve; and therefore upon ever question, respecting the jurisdiction of the house of assembly, if the frame of government is silent, the jurisdiction is efficient and complete. But in delegating fœderal powers, another criterion was necessarily introduced, and the congressional authority is to be collected, not from tacit implication, but from the positive grant expressed in the instrument of union. Hence it is evident that in the former case every thing which is not reserved is given, but in the latter the reverse

> of the proposition prevails, and every thing which is not given, is reserved.

James Wilson, Speech in the State House Yard, Oct. 6, 1787, *reprinted in* 1 Debate at 63–64.

From this explanation it was a small step for Wilson to flourish the doctrine of enumerated powers as the means of accurately marking the line dividing federal and state powers.

> Sir, I think there is another subject with regard to which this Constitution deserves approbation. I mean the accuracy with which the *line is drawn* between the powers of the *general government* and those of the *particular state governments*. We have heard some general observations, on this subject, from the gentlemen who conduct the opposition. They have asserted that these powers are unlimited and undefined. These words are as easily pronounced as *limited* and *defined*. . . . But it is not pretended that the line is drawn with mathematical precision; the inaccuracy of language must, to a certain degree, prevent the accomplishment of such a desire. . . . [A]re not the enumerated powers as well defined here, as in the present Articles of Confederation?

James Wilson, Speech at the Pennsylvania Ratifying Convention, Dec. 4, 1787, *reprinted in* 5 THE FOUNDERS' CONSTITUTION 400–01 (Phillip B. Kurland & Ralph Lerner eds., 1987).

Other defenders of the Constitution echoed Wilson's arguments. James Iredell, speaking before the North Carolina Ratifying Convention, emphasized the doctrine of enumerated powers. "The powers of the government are particularly enumerated and defined: they can claim no others but such as are so enumerated. In my opinion they are excluded as much from the exercise of any other authority as they could be by the strongest negative clause that could be framed." James Iredell,

Speech at the North Carolina Ratifying Convention (July 30, 1788), *reprinted in* 2 Debate, at 914. In Virginia, Madison stressed the doctrine of enumerated powers. "[T]he powers of the Federal Government are enumerated; it can only operate in certain cases: It has Legislative powers on defined and limited objects, beyond which it cannot extend its jurisdiction." James Madison, Speech in the Virginia Ratifying Convention (June 6, 1788), *reprinted in id.* at 620. In Connecticut, similar ideas were neatly expressed in a newspaper polemic. "The powers vested in the federal government are particularly defined, so that each state still retains its sovereignty in what concerns its own internal government and a right to exercise every power of a sovereign state not particularly delegated to the United States." A Citizen of New Haven, Jan. 7, 1788, *Connecticut Courant*, *reprinted in* THE COMPLETE BILL OF RIGHTS 701 (Neil H. Cogan ed., 1997).

Antifederalists refused to be swayed. In Pennsylvania, for example, William Findley pointed to "[t]he judiciary power, which is co-extensive with the legislative," William Findley, Pennsylvania Ratifying Convention, Dec. 1, 1787, *reprinted in* 1 Debate, at 819, as further evidence that "the proposed constitution established a general government and destroyed the individual governments." *Id.* at 818.

James Wilson replied that the federal judiciary represented one of the Constitution's "efficient restraints upon the legislative body." James Wilson, Pennsylvania Ratifying Convention (Dec. 1, 1787), *reprinted in id.* at 822; *see also* Federalist No. 78, at 526 (stating that "courts of justice are to be considered as the bulwarks of a limited constitution against legislative encroachments").

> [U]nder this constitution, the legislature may be restrained, and kept within its prescribed bounds, by the interposition of the judicial department. . . . I had occasion, on a former day, to state that

> the power of the constitution was paramount to the power of the legislature, acting under that constitution. For it is possible that the legislature, when acting in that capacity, may transgress the bounds assigned to it, and an act may pass, in the usual *mode*, notwithstanding that transgression; but when it comes to be discussed before the judges—when they consider its principles, and find it to be incompatible with the superior power of the constitution, it is their duty to pronounce it void; and judges independent, and not obliged to look to every session for a continuance of their salaries, will behave with intrepidity, and refuse to act the sanction of judicial authority.

James Wilson, Pennsylvania Ratifying Convention (Dec. 1, 1787), *reprinted in* 1 Debate at 822-23.

Oliver Ellsworth and John Marshall voiced nearly identical arguments in their respective state conventions. Oliver Ellsworth, Connecticut Ratifying Convention, Jan. 7, 1788, *reprinted in id.* at 883; John Marshall in Virginia Ratifying Convention, June 20, 1788, *reprinted in* 2 Debate, at 731–32. Interestingly, Marshall invoked the doctrine of enumerated powers and judicial review as defenses to George Mason's claim that the powers delegated to the federal judiciary in Article III were "unnecessary and dangerous, as tending to impair and ultimately destroy the State Judiciaries, and by the same principle, the legislation of the State Governments." George Mason, Virginia Ratifying Convention, June 19, 1788, *reprinted in id.* at 726.

These public assurances demonstrate that by the end of the ratifying process, the Founding generation regarded the doctrine of enumerated powers as the mainspring of federalism and judicial review as its chief security. *See* John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1375 (1997).

B. Precedent and Scholarly Commentary Agree that Federalism Must Be Understood from the Perspective of Enumerated Powers

The Court early on accepted the doctrine of enumerated powers as its guiding principle in discerning the boundary dividing federal and state powers. This was in keeping with the doctrine's firmly established place at the foundation of constitutional law. *See Calder* v. *Bull*, 3 U.S. (3 Dall.) 386, 399 (1798) (opinion of Iredell, J.); *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 326 (1816); *Van Horne's Lessee* v. *Dorrance*, 28 F. Cas. 1012 (C.C.D. Pa. 1795) (No. 16,857) (Paterson, J.). In the leading case of *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819), Chief Justice Marshall, writing for the Court, laid down the principles by which to resolve "the conflicting powers of the government of the Union and of its members." *Id.* at 400. To decide that conflict, Justice Marshall heavily relied on the proposition that "[t]his government is acknowledged by all, to be one of enumerated powers." *Id.* at 405. Because the case ultimately turned on the existence of implied powers, *id.* at 425, one could easily overlook the fact that Marshall repeatedly invoked the doctrine of enumerated powers as the rule for settling the conflicts between federal and state powers. *See id.* at 406–09, 412–13. In subsequent cases the Court reaffirmed its acceptance of the doctrine of enumerated powers as guiding principle in deciding federal-state conflicts. *See, e.g.*, *Wheeling, Parkersburg & Cincinnati Transp. Co.* v. *City of Wheeling*, 99 U.S. 273, 279 (1878); *United States* v. *Butler*, 297 U.S. 1, 68 (1936).

Ableman v. *Booth*, 62 U.S. (21 How.) 506 (1859), contains an especially illuminating discussion on this point. There Justice Taney, writing for the Court, acknowledged that "the courts of a State, and the courts of the United States, might, and indeed certainly would, often differ as to the extent of the powers conferred

by the General Government." *Id.* at 519. From this the Court reasoned that resulting disputes "must be settled by force of arms, unless some tribunal was created to decide between them finally and without appeal." *Id.* at 519–20. It then noted that the range of federal jurisdiction described in Article III "covers every legislative act of Congress, whether it be made within the limits of its delegated powers, or be an assumption of power beyond the grants in the Constitution." *Id.* at 520. Armed with such broad authority and the doctrine of enumerated powers, the Court considered itself capable of blunting attacks on federalism, whether from the direction of the federal government or the states.

> This judicial power was justly regarded as indispensable, not merely to maintain the supremacy of the laws of the United States, but also to guard the States from any encroachment upon their reserved rights by the General Government. And as the Constitution is the fundamental and supreme law, if it appears that an act of Congress is not pursuant to and within the limits of the power assigned to the Federal Government, it is the duty of the courts of the United States to declare it unconstitutional and void.

Id.

Notice that the Court makes a passing reference to the states' "reserved rights" in this passage. Yet the reference is just that—passing. The central argument in *Ableman* does not rely on identifying the powers reserved in the states as a means of shielding them from federal encroachment. Instead, as this passage shows, the Court in *Ableman* understood federalism in precisely the same terms expressed by Wilson and the other Founders during the ratification debates. According to that understanding, judicial review safeguards federalism by holding the federal government within

the bounds set by the delegations and disabilities comprising the written Constitution.

Influential commentators have agreed that the doctrine of enumerated powers supplies the key principle for correctly understanding federalism. Justice Story, certainly no slouch when it came to broadly construing federal authority, *U.S. Term Limits* v. *Thornton*, 514 U.S. 779, 856 (1995) (Thomas, J., dissenting), predicted dire results if the doctrine of enumerated powers were disregarded. "The result would be, that the powers of congress would embrace the widest extent of legislative functions, to the utter demolition of all constitutional boundaries between the state and national governments." JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 372 (abridged and reprint ed., 1987) (1833).

Alexis de Tocqueville wrote that "the attributes of the federal government were carefully defined, and it was declared that everything not contained within that definition returned to the jurisdiction of state governments. Hence state authority remained the rule and the federal government the exception." ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 114–15 (George Lawrence trans. & J.P. Mayer ed., 1969).

More recently, Edwin Corwin identified the doctrine of enumerated powers as the primary ingredient of dual federalism, which he defined in terms of four "postulates or axioms of constitutional interpretation closely touching the Federal System." Edwin S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1, 4 (1950). In Corwin's view, the replacement each of these "axioms" with "a concept favorable to centralization" explains how "the Federal System has shifted base in the direction of a consolidated national power." *Id.* at 2. Like Story, Corwin fingered the doctrine of enumerated powers as a principle without which federalism will die.

C. The Doctrine of Enumerated Powers Yields a Coherent Theory of Judicial Review in Federalism Cases, Which Interpreting Federalism from the Perspective of Reserved Powers Cannot Provide

1. *The doctrine of enumerated powers makes sense of the language and structure of the Tenth Amendment*

The Tenth Amendment provides, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." U.S. CONST. amend. X. Notice that the first phrase points to the category of "powers *not* delegated to the United States by the Constitution." *Id.* (emphasis added). The second refers to "powers [not] prohibited by [the Constitution] to the states." *Id.* Presumably this meant the prohibitions on state power spelled out in Article I, § 10. Following these is a clause containing the amendment's only verb, "reserved." What is reserved? The categories of power described in the first two phrases, namely, powers not delegated to the federal government and powers not prohibited to the states. These categories compose all the powers and disabilities in the Constitution, save the prohibitions on federal power catalogued in Article I, § 9. The clause and the final phrase answer the question, reserved for whom? Reserved for "the states respectively" or "the people." *Id.*

Emphasizing the enumerated powers aspect of the Tenth Amendment makes the best sense of its plain language and structure. The words of the Tenth Amendment confirm that the states or the people have all power that the people have not already delegated to the federal government or prohibited to the states. If the Constitution circumscribes the limits of federal authority and places certain limits on the states, as well,

it follows that every power falling outside those circles belong to the states or the people.

Emphasizing the reserved powers aspect of the Tenth Amendment leads headlong into a dead end, however. If the Constitution affirmatively protects reserved powers, why does it say nothing about them? Besides the passing reference to reserved powers in the Tenth Amendment, the rest of the Constitution is silent on the question. Surely a document that took several months of painstaking deliberation to write and ratify would yield a better answer to this question than "because the Tenth Amendment says so." Yet that is all a reserved powers interpretation of the text offers.

2. *Adopting the doctrine of enumerated powers as a guiding principle for deciding federalism cases establishes judicial review on a solid foundation of popular sovereignty*

The doctrine of enumerated powers rests on the premise that the American people are sovereign and that in their sovereign capacity they have constituted state and federal governments. To each they have delegated certain powers and withheld others. Some powers they have kept entirely for themselves, such as the rights of free speech and religion. "[T]hat these limits may not be mistaken, or forgotten, the constitution is written." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 176 (1803). The Constitution thus marks the line running between federal and state powers; it accomplishes this by defining the powers delegated to the federal government and leaving the rest to the states or the people.

Guided by the doctrine of enumerated powers, judicial review in federalism cases proceeds on exactly the same theory as it does for any other question "arising under this Constitution." U.S. CONST. art. III, § 2. Chief Justice Marshall expressed that theory in

terms that indicate its basis in popular sovereignty. "Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature repugnant to the constitution is void." *Marbury*, 5 U.S. at 177.

Unfortunately, reading the Tenth Amendment from the direction of reserved powers yields a thin and unsatisfying theory of adjudication. It requires courts to identify the members of a class—powers reserved to the states or the people—on which the Constitution is almost entirely silent. Other than the reference in the Tenth Amendment, the Constitution provides no basis for deciding when a congressional act violates "constitutional principles of federalism" by identifying powers reserved to the states and then protecting them from federal interference. At most a reserved powers approach allows one to defend the exercise of judicial review in federalism cases by pointing to the Tenth Amendment and to the manifest importance of preserving *some* division of power between the federal government and the states.

3. *Adopting the doctrine of enumerated powers as its guiding principle in federalism cases keeps the Court close to the form of government ratified by the American people*

Because it hews close to the words of the Constitution (and to the original understanding of that text), the doctrine of enumerated powers ties the decisions of this Court to the form of government ratified by the American people. That virtue is considerable. "The individual American—as the heir to those who brought the Constitution into being and agreed to its adoption—has a fundamental entitlement to living under the form of government spelled out in the Constitution."

A.E. Dick Howard, Garcia *and the Values of Federalism: On the Need for a Recurrence to Fundamental Principles*, 19 GA. L. REV. 789, 795 (1985).

Approaching federalism from the direction of reserved powers lacks that virtue. It carries the significant danger that judicial decisions will cut too far, either in favor of the states or the federal government. The resulting line dividing federal and state powers may resemble the federalism designed by the Founders and ratified by the people in name only. Given the antidemocratic implications of fundamentally revising the constitutional order without constitutional guidance, this danger ought to be regarded as substantial indeed.

4. *The doctrine of enumerated powers enables the Court to recognize that it is people, not states, who lose when federalism is eroded*

Locating sovereignty in the American people holds profound implications for federalism. If sovereignty lies with the people, then the dichotomy between states' rights and federal power is false. The people, not states, win when federal power is restrained within the limits demarcated in the written Constitution. Hence an *ultra vires* federal act robs the American people of powers they did not consent to giving up.

Things look substantially different from the perspective of reserved powers. From that position federalism is a tug-of-war between governments, rather than a constitutional device protecting individual liberty. *See Gregory v. Ashcroft*, 501 U.S. 452, 457–59 (1991). Because a reserved powers approach views federalism solely as a problem of guarding states from federal encroachment, it implicitly presumes that the federal and state governments are sovereign. And once they are regarded as sovereign, it follows that the

American people have little directly at stake when federal and state powers conflict.

5. *The doctrine of enumerated powers puts the burden of proof in federalism disputes on the federal government, where it belongs*

The doctrine of enumerated powers puts the burden of proof in federalism cases where it belongs. That doctrine requires the federal government to "show that what Congress has or might do has an appropriate connection to the powers that the Constitution delegates to it." H. Jefferson Powell, *Enumerated Means and Unlimited Ends*, 94 MICH. L. REV. 651, 672 (1995). Placing the burden of proof on the proponent of federal power respects the differing "default rules" that the doctrine of enumerated powers assigns to the federal government and the states. "[W]here the Constitution is silent about the exercise of a particular power—that is, where the Constitution does not speak either expressly or by necessary implication—the Federal Government lacks that power and the States enjoy it." *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779, 848 (1995) (Thomas, J., dissenting).

Approaching federalism from the direction of reserved powers, however, forces the states to bear the burden of proof. This turns the rule upside-down, defining any power not "reserved" as "enumerated" and therefore within the federal domain. *See id.* at 851–52. States win under the reserved powers theory only if the challenged federal action trenches on "core" or "traditional" functions of "states as states." *See National League of Cities* v. *Usery*, 426 U.S. 833, 841, 852 (1976), *overruled by*, *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). They cannot win solely because they demonstrate that a congressional act exceeds the authority granted by the people in the Constitution.

6. *The doctrine of enumerated powers enables the Court to view federalism as "an equilibrium of powers" rather than an isolated Tenth Amendment issue*

The habit of thinking of the Constitution mainly in terms of rights makes it tempting to read the Tenth Amendment in isolation from the rest of the Constitution. (The reserved powers approach inevitably succumbs to this temptation.) But the doctrine of enumerated powers, which takes its cue from "a fair construction of the whole instrument." *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 406 (1819), overcomes that temptation and reveals federalism as more than a Tenth Amendment issue.

Madison recognized that federalism forms "an equilibrium of powers as constitutionally divided between the Government of the whole and the Government of its parts . . . [and] the equilibrium must be equally disturbed by an assumption by either of the Governments of powers belonging to the other." Letter from James Madison to Francis T. Brook (22 Feb. 1828), *reprinted in* JJAMES MADISON'S "ADVICE TO MY COUNTRY" 48 (David B. Mattern ed., 1997). Understood in this way, it becomes clear that federalism is threatened quite as much by state laws unlawfully extended into the federal realm, *National Foreign Trade Council* v.*Natsios*, 181 F.3d 38 (1st Cir. 1999) as by the more common incursions into state authority by the federal government. *See Brzonkala* v. *Virginia Polytechnic Inst.*, 169 F.3d 820, 826 (4th Cir. 1999).

7. *Deciding federalism cases based on the doctrine of enumerated powers puts real constraints on governmental power—including the exercise of judicial review*

The doctrine of enumerated powers puts the constitutionalism in the Constitution. Whether defined as "a contrivance which not only describes but confines government, at least in its everyday activities." FRANCIS D. WORMUTH, THE ORIGINS OF MODERN CONSTITUTIONALISM 3 (1949), or as "the limitation of government by law," CHARLES HOWARD MCILWAIN, CONSTITUTIONALISM ANCIENT & MODERN 22 (1947), constitutionalism requires the placement of real constraints on government. The accent falls on the word "real." Experience shows that a written constitution standing alone poses no obstacle to arbitrary power, since many of them have become "merely precatory." *See* William W. Van Alstyne, *The Second Death of Federalism*, 83 MICH. L. REV. 1709, 1732 (1985). As Martin Diamond implored, unless "the Constitution has some sort of fixed, objective, intelligible, and accessible meaning, we cannot say that we govern ourselves under a constitution." Martin Diamond, *The Forgotten Doctrine of Enumerated Powers*, 6 Publius 187, 190 (Fall 1976).

The doctrine of enumerated powers acts as a real constraint on government. So much is clear from recent decisions applying the doctrine in cases where federalism figured prominently. *See United States* v. *Lopez*, 514 U.S. 549 (1995); *City of Boerne* v. *Flores*, 521 U.S. 507 (1997). But it also constrains the judiciary by anchoring federalism decisions in the text and original understanding of the written Constitution.

A reserved powers approach cannot do the same. It leaves the judiciary free to define the powers reserved to the states with nothing but a rubric and a purpose to steer by: the rubric of "reserved powers" and the purpose of safeguarding *some* allocation of powers

between the federal government and the states. Lacking any textual mooring, the reserved powers approach to protecting federalism resembles the "discrete and insular minorities," *United States* v. *Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938), approach to protecting civil rights. It simply launches the Court onto an uncharted sea of judicial legislation. At best, the Court can make a guess, which can at best be justified by analogizing the state activity in question with "core" state functions, such as legislation, that themselves are presumed to lie beyond federal control. But to make that guess the Court must travel beyond what the constitutional text will fairly justify.

D. Neither a Lack of Precision, the Risk of Formalism, Nor the Loss of Legislative Flexibility Offers a Persuasive Objection to Adopting the Doctrine of Enumerated Powers as the Court's Guiding Principle in Deciding Federalism Cases

Three objections may be raised. One might argue that the doctrine of enumerated powers does not precisely settle federal-state conflicts, especially in close cases. Or one could reject the doctrine of enumerated powers on the grounds that it is excessively formalistic or that it deprives Congress of needed flexibility. None of these objections holds up.

The difficulty of using the doctrine of enumerated powers to settle closely-contested federalism cases sounds serious. Even James Wilson admitted that the line dividing federal and state powers is not "drawn with mathematical precision." James Wilson, Speech at the Pennsylvania Ratifying Convention (Dec. 4, 1787), *reprinted in* 5 THE FOUNDERS' CONSTITUTION 400–01 (Phillip B. Kurland & Ralph Lerner eds., 1987).

Yet the argument from imprecision proves too much. The doctrine of enumerated powers directs the Court to examine the entire Constitution for proof or disproof

that a particular federal act is valid. *See McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 406 (1819). If the features marking the end of federal power were as imprecise as some might claim they are in the area of federalism, judicial review would be discredited as an exercise in bold fiat rather than a vindication of popular sovereignty. In fact, courts manage to draw fine lines when the question is one of preemption. *See, e.g.*, *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504 (1992). "It is only when *state* prerogatives are at issue that federal judicial competence suddenly comes into question." Steven G. Calabresi, *"A Government of Limited and Enumerated Powers,"* 94 MICH. L. REV. 752, 800 n.156 (1995). Besides, arguments based on the doctrine of enumerated can settle federalism questions, as the Brief *Amicus Curiae* of the Pacific Legal Foundation attests. *See id.* 4–11.

To the degree that relying on the principle of enumerated powers is charged with entangling the Court in the dreaded coils of formalism, the proper answer is that constitutionalism *is* formalism. *See* HARVEY C. MANSFIELD, JR., AMERICA'S CONSTITUTIONAL SOUL 200 (1991); *see also* ANTONIN SCALIA, A MATTER OF INTERPRETATION 25 (1997) (celebrating formalism as the basis of the rule of law). Moreover, as this Court has recognized, constitutional forms wisely constrain the government, even when its purpose is benevolent.

> Much of the Constitution is concerned with setting forth the form of our government, and the courts have traditionally invalidated measures deviating from that form. The result may appear "formalistic" in a given case to partisans of the measure at issue, because such measures are typically the product of the era's perceived necessity. But the Constitution protects us from our own best intentions: it divides power among sovereigns and among branches of government precisely so that we may resist the temptation

> to concentrate power in one location as an expedient solution to the crisis of the day.

New York v. *United States*, 505 U.S. 144, 187 (1992).

The argument from legislative flexibility makes an appearance in this case. Petitioners urge the Court to interpret the Interstate Commerce Clause, U.S. CONST. art. I, § 8, cl. 3, so as to leave Congress with what the government regards as salutary flexibility. "[T]he breadth of the Clause confirms that it vests in Congress the inherent discretion normally possessed by legislative bodies to adapt their laws to the problems they confront, including the flexibility to choose between laws of general and particular applicability." Br. Pet. 44–45. To this the Court has written an apt riposte.

> Legislative flexibility on the part of Congress will be the touchstone of federalism when the capacity to support combustion becomes the acid test of a fire extinguisher. Congressional flexibility is desirable, of course—but only within the *bounds of federal power* established by the Constitution. Beyond those bounds (the theory of our Constitution goes), it is a menace.

College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 119 S. Ct. 2219, 2233 (1999); *see also First English Evangelical Lutheran Church* v. *Los Angeles County*, 482 U.S. 304, 321 (1987) ("many of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities").

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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